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Thirtieth session

SUMMARY RECORD (PARTIAL)* OF THE 607th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 12 May 1997, at 10 a.m.

Chairman: Mr. BOSSA (Uganda)

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* No summary record was prepared for the rest of the meeting.

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The discussion covered in the summary record began at 10.50 a.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (A/CN.9/435)

General remarks

1. **Mr. SEKOLEC** (International Trade Law Branch) introduced the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency prepared by the Working Group on Insolvency Law (A/CN.9/435, annex). The practical problems in that area of law had been first discussed in the Commission in 1993. The topic had been suggested by the Secretariat as the result of observations and suggestions made in 1992 at the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century. Several references had been made there to the difficulties which arose in insolvency cases where the debtor had assets in more than one State.

2. The discussion at the Congress and in the Commission in 1993 had highlighted the need for caution, bearing in mind the failed attempts at harmonization in other forums. It had been considered preferable to begin with work on topics that lent themselves to harmonization. Substantive rules of national laws on insolvency could not readily be harmonized.

3. The Commission had asked the Secretariat to study the issue further. The Secretariat had contacted relevant international organizations with expertise in the area, and had worked particularly closely with the International Association of Insolvency Practitioners (INSOL). In April 1994, UNCITRAL and INSOL had held a Colloquium on Cross-Border Insolvency with the aim of identifying the problems and considering possible solutions. The outcome had been the suggestion that the Commission should confine itself to considering possible rules in three areas: (a) judicial cooperation between courts supervising insolvent debtors in more than one country; (b) access of foreign insolvency administrators to courts in the States enacting the rules; (c) the recognition of foreign proceedings in enacting States, and the effects to be given to those proceedings.

4. At the first Colloquium, it had been recognized that all the rules would basically be addressed to judges, and that judges should be involved in the discussions. For that purpose, UNCITRAL and INSOL had convened a Judicial Colloquium on Cross-Border Insolvency in March 1995. The views of the participating judges and government officials had been in line with those that had emerged at the 1994 Colloquium. Armed with those views, the Commission, at its twenty-eighth session in May 1995, had decided that uniform rules should be prepared to cover the three areas in question, and had asked its third Working Group to prepare such rules. That Group, now called the Working Group on Insolvency Law, had devoted four two-week sessions to the project, and the draft Model Legislative Provisions on Cross-Border Insolvency prepared by it, and now before the Commission, were annexed to document A/CN.9/435, the report on the last of those sessions (the Working Group's twenty-first session).

5. At its twentieth session, the Working Group had discussed the form that the instrument being prepared should take. The widely prevailing view had been that a model national statute, or set of legislative provisions, would be appropriate to give judicial cooperation a clearer legal framework. An international treaty, on the other hand, would require a cumbersome process of adoption. The issue concerned national procedural law, an area of law which was not easy to harmonize through treaties. For the sake of speed, model legislation was generally considered the preferable solution. Nevertheless, some had expressed the view that certain aspects of the subject would be more appropriately dealt with in an international treaty. If, after adopting model legislation, the Commission felt there was a need for an international treaty, that could be discussed and decided at a later stage.

(*Mr. Sekolec, International Trade Law Branch*)

6. After the last session of the Working Group, in January 1997, the Secretariat, in cooperation with INSOL, had convened another Judicial Colloquium; it had been held in March 1997, in conjunction with the 5th World Congress of INSOL, and had lasted two days. The participants had been mainly judges, with some national regulators and government officials. The Colloquium had considered the draft Model Provisions, and there had been general support for the idea of model legislation, and for the substance of the text.

7. Lastly, in line with some of the more recent model laws prepared by the Commission, the Working Group had felt that it would be good to prepare an accompanying Guide to Enactment, to assist legislators in transposing the model text into national law. It would not be a commentary on the text or attempt to interpret it, but would be intended to aid the legislative process, although it might also be useful to practitioners. The Secretariat had prepared a draft of the Guide, but it had not yet been translated into all the official languages.

8. **The CHAIRMAN** pointed out that, as explained in paragraph 16 of its report (A/CN.9/435), the Working Group would have wished to have more time available for completing its review of the draft, but had decided, in line with the hope expressed by the Commission at its twenty-ninth session, to submit the draft Model Legislative Provisions to it for consideration and completion at its thirtieth session. The Working Group suggested that the Commission begin its considerations with article 14 and the following articles.

9. If there were no other suggestions, therefore, he proposed to start the discussion of the text with article 14. First, however, he invited general observations.

10. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the draft would be of great importance in protecting the rights of creditors. He noted that the title chosen by the Working Group was "Draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency", implying a decision that the instrument being prepared would take the form of a model law. However, he did not think that a decision had yet been taken between a treaty and a model law. Was that issue still open for discussion?

11. **Mr. SEKOLEC** (International Trade Law Branch) drew attention to the considerations of the Working Group on that point, as summarized in the report on its twentieth session (A/CN.9/433), in paragraphs 16 to 20, and particularly to the Working Group's suggestion in paragraph 20 that the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency should be considered at a later stage.

12. **Ms. SABO** (Observer for Canada) expressed the hope that the work would be completed in the time available. She supported the suggestion to start with article 14, which would allow the Commission to discuss key provisions early on, and then deal with the others later.

13. **Mr. TELL** (France) said that he saw no particular need to begin the discussion with article 14 since, although it contained the core of the text, there were also important questions to settle in articles 1 to 13.

14. **The CHAIRMAN** said the intention was that the Commission should cover all the articles in the session.

15. **Mr. COOPER** (Observer for the International Association of Insolvency Practitioners) informed the Commission that a short report, unfortunately only in English, on the Judicial Colloquiums was available on request. A full transcript would be ready by June 1997.

(*Mr. Cooper, Observer for the International Association of Insolvency Practitioners)*

16. Considering the annual value of international trade, the enormous losses due to international insolvencies and the numbers of jobs lost, it was regrettable that a body such as UNCITRAL should be sort of resources.

17. **Mr. BURMAN** (United States of America) said that he had understood that the Working Group had agreed that the instrument to be discussed at the present session would be a model law. He hoped that the important work would be completed at the session. The Commission could revisit the issue, perhaps at its next session, to see if there was a sufficient degree of acceptance to consider recasting the model law as a multilateral treaty or convention. He would certainly engage actively in the discussion. In the meantime, it was very important to complete the project at the current session of the Commission. To accomplish that for an instrument other than a model law, such as a treaty, would require at least one more session of the Working Group plus one more session of the Commission.

18. **Mr. SEKOLEC** (International Trade Law Branch) explained that the text elaborated by the Working Group had been drafted as model legislation and contained many provisions which would not work in a treaty, and which would need to be deleted or changed, and new provisions would have to be added. Preparation of a treaty would be a different project in many ways.

19. **Ms. INGRAM** (Australia) said that she strongly supported the basic thrust of the text prepared by the Working Group. She believed that it would make a real difference to the cross-border administration of insolvency, especially the regime whereby recognition was a simple, straightforward process with no inherent effects except in a very few cases—just a gateway to cooperation.

20. She strongly supported the minimum standard set of relief measures available to foreign administrators following recognition, to facilitate worldwide administration of insolvent enterprises. She also welcomed the emphasis on cooperation at all levels, and predictable and swift access to remedies.

21. She agreed with the proposal to start with article 14, which was the first of the articles on recognition and relief. She also supported the views of the representative of the United States of America on the form of instrument.

22. **Mr. YAMAMOTO** (Japan) said that, in the previous year, his Government had begun preparatory work on amending the rules on insolvency procedures, with cross-border insolvency as a major issue. Although there was room for improvement in the draft, he hoped that the Model Provisions plus the Guide to Enactment could be adopted at the session. Given the difficulty of harmonizing procedural rules, together with his country's special circumstances, he preferred a model law to a convention.

23. **Mr. AL-NASSER** (Saudi Arabia) said that document A/CN.9/435 had been examined by the authorities in his country, resulting in the conclusion that draft legislative provisions or a model law were preferable. A convention or treaty could prove difficult for some countries to accept. The intention from the outset had been to prepare model legislative provisions, not a convention.

24. **Mr. ABASCAL** (Mexico) doubted the wisdom of trying to complete the work at the present session. The adoption of model legislative provisions on international insolvency would be a very important step and was also a new topic. Governments were probably not fully aware of the work being done. The report of the last Working Group session had only recently been issued, allowing little time for consideration of the text. Nor had

(Mr. Abascal, Mexico)

the draft Guide to Enactment of the Provisions been circulated in the official languages. It would be wise to allow the matter to mature a little longer, to ensure acceptance by the international community.

25. **Mr. MAZZONI** (Italy) supported the choice of a model law; it would not be the end of the matter, but would be an important first step. If there was wide enough support, more ambitious projects could be undertaken. He had expressed doubts concerning the plan to complete the work at the current session during the last Working Group session. Since, however, the decision had been taken to proceed, there should be a bona fide attempt to make as much progress as possible.

26. As to starting with article 14, all the provisions were linked to each other, and a start could equally well be made with article 2, for example. However, he believed that the consensus was that the provisions in articles 14 to 23 were the essential provisions of the model law, so he could support starting with article 14.

27. He suggested the inclusion of two ideas in article 14, under two separate paragraphs. The first paragraph would confine itself to indicating, in a restrictive manner, those few specific grounds on which recognition of a foreign proceeding might be refused. It would be a safety valve, allowing, for example, for the notion of public policy, i.e. referring to article 6.

28. The second paragraph would deal with the difficult issue of recognition applied for when, in the enacting jurisdiction, insolvency proceedings having the nature of a main proceeding were already pending. In that case, unless the model law took a differentiated approach, he thought that in certain countries, including his own, recognition of the foreign proceeding would simply be refused if the automatic consequences of article 16 were attached. He therefore suggested that it should be made simple and straightforward to obtain recognition when there was no local obstacle in the form of a local proceeding, and that provision should be made for recognition for the sole purpose of coordination when a local proceeding having the nature of a main proceeding was pending.

29. **Mr. SEKOLEC** (International Trade Law Branch) said he had a technical observation to make. One of the suggestions of the representative of Italy touched on the question of concurrent proceedings. The Secretariat had received a written proposal prepared by a number of delegations on concurrent proceedings which would be available in the official languages in a day or two. Italian proposals on article 14 and other articles had also been submitted in writing and would be available soon.

30. **Mr. TER** (Singapore) said that he had no difficulty with the suggestion that the Commission should complete the model law and then consider whether or not there should be an international treaty. His country, as a trading nation, relied heavily on trade, and realized that the harmonization of trade law was of critical importance.

31. **Mr. BERENDS** (Observer for the Netherlands) said, on the issue of a treaty or model legislation, that a treaty night be preferable, but he doubted whether it was achievable. All wanted progress towards a convention, but the Model Provisions were a necessary step on the way, and he thus supported them. He preferred to take article 14, the core of the work, as a starting point.

32. **Ms. NIKANJAM** (Islamic Republic of Iran) said that the Model Provisions were a step towards legal cooperation between Governments and courts. She too would prefer a model law because it would be simple for Governments and parliaments to adopt. It would not involve a long process like a treaty or convention. It also offered more flexibility.

33. She would also prefer to start work with the crucial articles, beginning with article 14. She had some remarks on article 14 which she would make later. She thought it should be redrafted to make it more specific and to the point.

34. **Mr. AL-NASSER** (Saudi Arabia) agreed with what had been said by the representative of Mexico. The Model Provisions needed to be very thoroughly examined by the relevant authorities, and could be adopted at a future session. In the past, the Commission had devoted a great deal of time at successive sessions to the consideration of such issues.

35. He also believed that discussion should start with article 14 and those following.

36. **Mr. GRANDINO RODAS** (Brazil) agreed that the text on insolvency—which should take the form of model legislative provisions—should not be adopted hastily at that session.

37. **Mr. MÖLLER** (Finland), addressing the issue of a convention versus a model law, said he saw the advantage of drawing up a convention; however, that was not realistic at the current stage. Even in a regional context, it was difficult to reach agreement on questions of procedure. The approach of model legislation was therefore appropriate.

38. The work should start with the essential articles, beginning with article 14, since they might require lengthy discussion. The issue of concurrent proceedings need not be included in article 14, but it would be wise to have a reference in that article to article 6 on public policy.

39. **Mr. GLOSBAND** (Observer for the International Bar Association (IBA)) said that the draft represented a genuine effort to reach consensus. There were certain issues that it had not been possible to discuss at the Working Group sessions. One was the issue of concurrent proceedings. As the Secretariat had indicated, a proposal had been submitted on that topic. Concerning article 14, the Italian proposal seemed acceptable, although he thought that the second paragraph proposed by the Italian delegation would be covered in the section on concurrent proceedings.

40. An attempt to have the Model Provisions approved at the present session would be very timely, especially for countries like Japan and the United States which were currently studying their bankruptcy laws with a view to their amendment.

41. Finally, he supported considering the draft as model legislation. His organization had been studying cross-border insolvency for longer than UNCITRAL, and had noted that there had been little success in getting broad multilateral treaties or conventions adopted. Thus the prospects for adopting legislation that would genuinely improve the real world of cross-border insolvency lay in model legislative provisions. Once those had been adopted in some countries, UNCITRAL could turn its attention to a treaty. He would support that, but it should not delay the current process.

42. **Mr. Ho Jin LEE** (Observer for the Republic of Korea) supported the view that consideration of the Model Legislative Provisions should precede any subsequent deliberations on the need for an international convention. He supported the format of model legislation, given the differences in national legislation addressing problems arising from cross-border insolvency. Later, if there was a need, the model legislation might be recast in the form of an international treaty or convention. As a trading country, his country had great interest in the harmonization and unification of many aspects of international trade law.

43. **Mr. SHANG Ming** (China) agreed that the format of the instrument should be model legislation. He also shared the concerns of the representatives of Mexico and Brazil. By comparison with a model law, the technical difficulties of a convention were very great. A model law was more flexible, because a convention or treaty had to be accepted as a whole.

44. Some texts such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1980 Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention) had been widely accepted. He felt that if the Commission wanted a treaty format it should proceed with caution, so as to ensure similar wide acceptance.

45. The present project had his full support. With world developments, transnational or cross-border insolvency had become a common phenomenon. However, in view of the implications for national legislative systems and national legislators, he felt that there was no need to set oneself the target of finishing at that session. Some issues needed careful discussion.

46. **Mr. TELL** (France) said that his delegation, in the Working Group, had stressed its preference for a convention, even if it was a more ambitious project, over a model law. The model law would not serve the purpose of harmonizing procedures. He understood the position of those who preferred a model law, the main objective being to encourage legislative reform in many States. However, agreements, at least bilateral agreements, would be necessary for the implementation of certain provisions, especially where the principle of reciprocity applied.

47. If, as it appeared, there was a general consensus in favour of a model law, it was desirable that the work should be completed at that session.

48. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that he would prefer model legislation because, from the point of view of his country's Constitution, the ratification of a treaty or convention was a complicated procedure. There was a real gulf between national laws on cross-border insolvency. Model legislative provisions provided the necessary flexibility, making it possible for national legislators to draw up and promulgate provisions. Despite the difficulties regarding reciprocity, he was in favour of model legislation.

49. On the organization of work, there would be arguments in favour of starting with article 1; however, there might be good reasons for starting with article 14.

50. **Mr. NICOLAE VASILE** (Observer for Romania) thought that the appropriate form for the text to be adopted was a model law. The objective pursued by the Working Group would be achieved by a model law, which might be transformed into a convention at a later stage.

51. **Mr. AL-NASSER** (Saudi Arabia), referring to the remarks of the observer for the International Bar Association, said that if the provisions were acceptable in the United States and Japan, the adoption of the model law would be acceptable to many States.

52. The source of problems was a lack of legal provisions to deal with issues relating to insolvency in a clear manner. Such legal provisions as there were were outdated, or concerned with the internal situation only.

53. **The CHAIRMAN** said he took it that the preference of the Commission was to open deliberations on the substance with article 14.

Organization of work

54. **Mr. SEKOLEC** (International Trade Law Branch) said he wished to draw attention to the fact that, to allow savings to be made, summary records reflecting the present discussions would be prepared subsequently from tapes. It would be helpful if any written notes covering delegations' statements could be made available to the Secretariat, with an indication of the date, time and subject of the statement concerned.

55. He also wished to remind delegations that, since it was hoped that a final text would be adopted at the session, a drafting group, with all six languages represented, would need to be established to implement the decisions of the Commission. It would meet in the evenings and prepare a finalized text of the Model Provisions for approval by the Commission.

Article 14

56. **Mr. SEKOLEC** (International Trade Law Branch) drew attention to the text of article 14 prepared by the Working Group (A/CN.9/435, annex) and said that, during the consideration of the text in the Working Group, one of the questions discussed had been whether public policy should be one of the grounds on which a foreign proceeding might not be recognized. It was proposed that public policy should be covered in article 6, but the question remained open whether a reference should be made to article 6 in article 14.

57. Another question that might need discussion concerned the word "only" in the *chapeau* of article 14. The word "only" would require all grounds for refusing recognition of foreign proceedings to be listed. If "only" were omitted, there might be some flexibility on the issue.

58. Only subparagraph (a) appeared in the draft as one of the grounds; it was for the Commission to decide what others to include. Suggested grounds were reflected in paragraph 176 of document A/CN.9/435.

The meeting rose at 12.30 p.m.