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Thirtieth session

SUMMARY RECORD OF THE 611th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 14 May 1997, at 9.30 a.m.

Chairman: Mr. BOSSA (Uganda)

CONTENTS

Cross-border insolvency: draft Model Legislative Provisions (*continued*)

Article 15 (*continued*)

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

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

Article 15 *(continued)*

1. **The CHAIRMAN**, summarizing, said that one of the proposals considered at the previous meeting had been to exclude all reference to article 17 in article 15. That proposal had not received sufficient support.

2. As to whether all the reliefs available under article 17 should also be available under article 15, there had been general agreement on the need to amend article 17 (1) (a), and consultations among some delegations had resulted in a compromise text. He invited the representative of the Secretariat to read out the proposed text.

3. **Mr. SEKOLEC** (International Trade Law Branch) said that the proposal was to replace the words "grant any relief mentioned in article 17" at the end of article 15 (1) by the following: "stay the execution of claims concerning the debtor's assets, rights, obligations and liabilities and grant any relief mentioned in article 17 (1), subparagraphs (b) to (f)".

4. **The CHAIRMAN** said that there had been insufficient support for a proposal to delete subparagraph (e) of article 17 (1). The provision of information, covered in article 17 (1) (d), had also been an issue; however, it was his understanding that the provisions concerning information would be applied in accordance with local law and that there was no need to modify the text. The proposal that the realization of assets under article 17 (1) (e) should be confined to perishable goods or those whose value changed rapidly had received insufficient support.

5. **Mr. TELL** (France), referring to the issue raised by his delegation concerning article 17 (1) (e), said that some speakers had indicated that it was a matter of protecting assets such as perishable goods. However, the provisions of article 17 (1) (e) were of a very general nature. If the objective was to provide for urgent measures to preserve assets in specific cases, he still did not understand the initial proposal for a "block" reference to article 17 in article 15. It would be preferable to provide for specific measures in article 15. It was now proposed to refer only to subparagraphs (b) to (f) of article 17 (1) in article 15. He had been under the impression at the previous meeting that it would be possible to find a formula meeting all concerns by providing for the realization of endangered assets while satisfying those who wanted to avoid a provision of a general nature, with the risks that would arise in some States for the interests of local creditors. It was essential to preserve a balance between the interests of local and foreign creditors. It should be remembered that the text was intended for the international community as a whole, and not just for certain legal systems. It must satisfy all legislators. His delegation would have difficulties if there were too many provisions not compatible with some legal systems.

6. **Mr. WIMMER** (Germany) welcomed the proposed amendment to article 15 (1). Concerning the reference in article 15 (1) to article 17 (1) (e), he would prefer the provision not to be limited to perishable goods. It was not possible to predict all cases when the administrator should be authorized to realize assets before the recognition of a proceeding.

7. **Mr. OLIVENCIA** (Spain) said that he could not take a position on the proposed amendment to article 15 (1) because its purport was not clear to him. He fully shared the concerns expressed by the representative of France. At the stage in the proceedings covered by article 15, it was not known whether or not

(*Mr. Olivencia, Spain)*

recognition would be granted. The same approach could not apply as in article 17, since the criterion in article 15 must be that of urgency. The measures needed to be graduated, and the new proposal did not achieve that. Moreover, a "block" reference would have an illogical consequence, since article 17 (1) (c) referred back to article 15 and a reference to it in article 15 made no sense. With regard to article 17 (1) (d), it was not enough to say that "discovery" was not meant and that domestic law would apply; a reference should rather be made to the urgent preservation of books, files and other documents. Similarly, the provision in article 17 (1) (e) should apply only in relation to urgent measures to conserve perishable assets of assets susceptible of devaluation; there could not be a general authorization to liquidate all goods in the territory of a State before the outcome of the relevant proceedings was known.

8. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that, as he understood it, article 15 concerned temporary relief covering the period from the application for recognition to the decision on recognition. The text of article 15 should be flexible, allowing the court to strike a balance between local law and international law, and general principles of justice. In his country, the courts would try to protect debtors' assets in order to protect the interests of local or foreign creditors. All reference to article 17 should be deleted from article 15 (1).

9. **Mr. AGARWAL** (India) said that the amendment to article 15 (1) that had been proposed would not materially alter the position. Rather than referring to article 17, the text might leave it to the court to provide appropriate relief as necessary to protect assets of debtors. Regarding article 17 (1) (e), the main concern related to a situation where there were goods of a perishable nature and urgent action was needed. Provision could be made for the court to have the power to arrange for the sale of such goods and keep the sales proceeds until claims were decided.

10. **Mr. MAZZONI** (Italy) supported the position of the representatives of France and Spain that reliefs available prior to the decision on the application for recognition should not be the same as reliefs available following recognition. There should be an emphasis placed on the specific reasons for granting prior relief.

11. **Mr. MÖLLER** (Finland) said that his concerns were covered by the new proposal read out by the representative of the Secretariat. The logical point raised by the representative of Spain regarding the "block" reference was a drafting matter; there could not be any real misunderstanding. He could agree to the reference to article 17 (1), subparagraphs (b) to (f).

12. As to article 17 (1) (e), even if the text did not refer explicitly to perishable goods or goods that would lose value, in many jurisdictions it would be possible only for such goods to be sold. Saying that the court "may" grant the reliefs referred to made it optional. The court's action would also be subject to further conditions under internal law.

13. **Mr. COOPER** (Observer for the International Association of Insolvency Practitioners) said that the proposed amendment to article 15 was entirely acceptable. Commenting on the statements of the representatives of France and Spain, he said that there would be a grave danger in trying to particularize those instances in which it was necessary in the creditors' interests to realize assets. However long the list, there was always the danger in the real world of unforeseen circumstances not included in the list, in which case relief would not be available. The representative of Spain would like a gradation in the measures provided for, but that would not work in practice because it was not possible to predict what might occur.

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

14. An attempt had been made to distinguish between liquidation and preservation. The fact was that liquidation often led to preservation of employment and markets. For example, a branch of an enterprise in another country employing people and providing a market-place for goods or services might have to be sold quickly so that it could continue as a going concern; that was liquidation in one sense, but preservation in a wider sense. One could not, therefore, view article 15 in terms of an ideological distinction between preservation and liquidation.

15. Others had suggested that the problem could be solved by making article 15 a very wide discretionary article. In view of the progress made in marrying article 15 with article 17, he thought it would be going backwards to return to generality.

16. **Ms. NIKANJAM** (Islamic Republic of Iran) said she thought that the reason for a "menu" approach in article 15, making reference to article 17, was to give courts an idea of the types of provisional relief that they could grant to foreign representatives. If such an approach was not desired, she did not see why a formula such as the proposed text read out earlier by the Secretariat was necessary: the text could be very general, as suggested by the representative of India, and provide, for example, that at the time of the application for recognition the court might grant any available provisional reliefs for the protection of the assets of the debtor and the interests of creditors.

17. **Mr. GRIFFITH** (Australia) said that a major objective was to provide certainty for administration. As it was not possible to foresee all circumstances, flexibility was needed, i.e. a "menu" like that in article 17 (1) (b) to (f) which would be available in emergency situations. Regarding the preservation of assets, it was not just a matter of perishable foodstuffs: any asset might in practice be "perishable" in the sense of being immediately in jeopardy. Especially in an era of electronic funds transfer, assets could be transferred rapidly overseas. Powers of the kind referred to in article 17 (1) (d) and (e) might be needed to avoid situations where assets of failing companies were lost because of a legal incapacity to trace or recover such assets.

18. **Mr. SANDOVAL** (Chile) shared the concerns expressed by the representatives of France, Spain and Morocco and could not accept a "block" reference to article 17. Nor did he support the proposed amendment read out at the beginning of the meeting, referring to certain subparagraphs. Article 15 had the specific purpose of allowing for urgent provisional measures to protect the assets of debtors and certain documents, and should be limited to that. The conception of bankruptcy and insolvency proceedings as a mechanism for reassigning assets in the market was not accepted in most insolvency legislation under the Roman law system. To liquidate was not to continue, and he could not accept the view that liquidation might be preferable to preservation. He thus supported those who argued that article 15 should have its own text, without any reference to article 17.

19. **The CHAIRMAN** thought that there was general agreement that article 15 differed from article 17. The main difference seemed to him to be that the relief under article 15 was provisional. He asked those delegations that wished to make a clear distinction between the articles to propose specific wording.

20. **Mr. TER** (Singapore) said he could accept the compromise proposal for article 15 (1). In his country's legal system, the law gave courts considerable freedom to use judgement in making orders. However, he was puzzled by the inclusion of subparagraph (c) of article 17 (1) in the reference.

21. **Mr. DOYLE** (Observer for Ireland) supported the amendment read out by the representative of the Secretariat.

22. **Mr. GLOSBAND** (Observer for the International Bar Association) said that he agreed with the observer for INSOL on the practical issues he had discussed. With regard to the point that relief under article 15 was available only in emergency situations to deal with urgent matters, he had thought that that was implicit in article 15 and in the very concept of provisional relief. If it would be helpful, the model law could specifically say, for example, that relief could be granted where necessary "on an emergency basis". It should not, however, limit the options available to deal with emergencies, not all of which were foreseeable.

23. **The CHAIRMAN** asked whether the addition in article 15 (1) of wording to the effect that the relief available would be for emergency purposes would address the concerns of delegations wanting a clear distinction between the relief in article 15 and the reliefs in article 17.

24. **Mr. WISITSORA-AT** (Thailand) said he would support such an addition. He agreed that the options in articles 15 and 17 should be the same, as both were meant to help creditors to track down debtors around the world. He saw no harm in leaving the measures to be decided by the local court.

25. **Mr. WIMMER** (Germany) said he thought, with respect to the concerns of some delegations regarding a "block" reference to article 17 in article 15, that the judge would be aware that he was acting in a provisional framework and that any decision he took would be provisional. It seemed self-evident that he was not allowed to anticipate the final decision. However, if it helped, he could support an addition stressing the provisional nature of the relief.

26. **Ms. LOIZIDOU** (Observer for Cyprus) said that her delegation was happier with the version of article 15 (1) read out by the representative of the Secretariat. However, Cyprus would still have difficulty in adopting a model law including in article 15 a reference to article 17 (1) (e) as it stood. The right of the court to entrust the administration and realization of assets to the foreign representative or any other person should be restricted to exceptional cases, such as when the goods were perishable, a term that would be defined in the model law.

27. **Mr. DOMANICZKY LANIK** (Observer for Paraguay) said that it would be useful to amend article 15 to make it clear that the relief referred to was urgent relief.

28. **Mr. BLOMSTRAND** (Observer for Sweden) welcomed the proposed amendment read out by the representative of the Secretariat to article 15 (1). It removed his delegation's difficulties regarding stay of proceedings and stay of execution. He could accept article 15 with that change, and understood that there needed to be flexibility as to reliefs that could be granted. If it would help other delegations, he could accept a mention in article 15 of "emergency cases" or "urgency", for example.

29. **Ms. UNEL** (Observer for Turkey) said that article 15 should be more general. It was not appropriate to make a "block" reference to article 17. In her view, the article should leave it to the judge to take the necessary measures under national law.

30. **Mr. ABASCAL** (Mexico) said that the reasons for authorizing the sale of assets or the administration of assets might be very good, but it must not be forgotten that the situation under discussion was one where there was only an application for recognition of proceedings, without any decision having yet been taken, and it would be difficult to go beyond measures for the preservation of assets, which should include the sale of perishable goods or those susceptible of devaluation. Disposal of assets or the taking over of administration had definitive consequences. Mexican law permitted the judge to take necessary measures to preserve assets, and

(Mr. Abascal, Mexico)

the Moroccan proposal would therefore be acceptable. But authorizing the sale of assets and the administration of assets might prevent Mexico from adopting article 15.

31. **Mr. WESTBROOK** (United States of America) supported the amendment read out by the representative of the Secretariat. Listening to the discussion, he was struck by the fact that two very different viewpoints were emerging. Some wished to delete any reference in article 15 to article 17. Others wanted more specificity or limitation with respect to provisional relief. There were merits in both approaches, and he recalled that, in the discussions during the Working Group sessions, his delegation had initially favoured a general, unrestricted provision in article 15. However, some delegations had wanted more specific provisions and, despite the legitimate concerns of the practitioners represented by INSOL and IBA, it had been agreed to make a reference to article 17 as a compromise, providing a degree of specificity but retaining some generality.

32. The suggestion of the representative of IBA to include a reference to urgency, or an emergency, was a very good idea. As had been said, the difference between articles 15 and 17 was a difference not of scope but of urgency. Relief under article 15 would be unlikely to be granted except for very urgent reasons in unusual situations. He could accept any language on those lines. But the Commission should not reopen the debate between generality and specificity. A compromise should be sought, and he urged delegations to ask themselves whether there could be a better compromise between generality and specificity than had been achieved through a reference to article 17.

33. **Mr. BERENDS** (Observer for the Netherlands) agreed with the representative of the United States of America. The emphasis on urgency, in his view, was unnecessary, but if it would be helpful, he could accept the suggested addition.

34. **Mr. MAZZONI** (Italy) supported the position of the representative of Mexico. It was not just a question of generality versus specificity, nor of the grounds for granting provisional relief. There must be consistency between the relief and the grounds, and limitations on the scope of the remedy that could be granted.

35. **Mr. SUTHERLAND-BROWN** (Observer for Canada) was in sympathy with many of the views expressed, especially by the representative of Sweden. In his country's system, provisional relief was only available if the applicant met stringent tests, i.e. if there would otherwise be irreparable harm to the applicant. The convenience of the applicant had to be balanced against that of the debtor. The court could also ask the applicant to give an undertaking in damages to the debtor to save him whole if, in the hearing on the merits, the applicant failed. That was how the provisional measures in article 15 would work, and that was why he supported the broad, flexible relief available by a "block" reference to article 17.

36. **Mr. TELL** (France) said that the issue was not whether there should be a detailed list of reliefs, nor was it a question of ideology. It had been argued that the same reliefs should be available under article 15 as under article 17, but that such relief would be granted only on grounds of urgency or on a provisional basis. It was further argued that article 15 could not provide for "made-to-measure" relief, so to speak. But it seemed to him that that was what the amendment proposed at the beginning of the meeting tried to do with regard to the stay of proceedings provided for in article 17 (1) (a). If it was possible to differentiate between articles 15 and 17 in respect of the provision in article 17 (1) (a), it should be possible similarly to adapt article 17 (1) (e) to the purpose of article 15.

37. **The CHAIRMAN** said there seemed to be a consensus against a "block" reference in article 15 to article 17. The next issue was to what extent the reliefs in article 17 could be modified for the purposes of article 15. The view seemed to be that article 15 should be so drafted as to be equated with article 17, and that article 15 should be

amended in the manner read out by the representative of the Secretariat and further amended to restrict the article's ambit by emphasizing the issue of urgency.

38. **Mr. SEKOLEC** (International Trade Law Branch) suggested that, subject to review by the drafting group, a solution might be to replace the words "where necessary" in paragraph (1) of article 15 by the words "where relief is urgently necessary".

39. **Mr. WIMMER** (Germany) suggested that the expression "relief of a provisional nature", or similar language indicating the scope of the relief in addition to its urgency, should be used.

40. **The CHAIRMAN** said that the matter would be referred to the drafting group.

41. **Mr. ABASCAL** (Mexico) said that the German suggestion was not a question of drafting. It should be stated in the text that the measures would be provisional.

42. **The CHAIRMAN** said there seemed to be agreement that article 15 (1) should be amended to indicate that the relief would be granted on grounds of urgency and be provisional in nature. However, there was still a strong feeling that a distinction should be made between relief of a definitive nature and temporary relief, particularly in relation to the relief provided for in article 17 (1) (e). Perhaps the representative of France could suggest appropriate wording.

43. **Mr. TELL** (France) proposed that article 15 (1) should be amended to state that the court might, if urgency (or the survival of the business) so required, stay the execution of claims and grant any relief mentioned in article 17 (1), subparagraphs (b), (c), (d) and (f), to protect the assets of the debtor or the interests of the creditors, and that the court might also, under the same conditions, grant the relief provided for in article 17 (1), subparagraph (e), to preserve assets which, by their nature or because of circumstances, were perishable, might lose their value or might be removed from the control of the foreign representative. It would also be stated that the relief would be provisional in nature, in line with the suggestion of the representative of Germany.

44. **Ms. SABO** (Observer for Canada) said that she agreed with the suggestion read out at the beginning of the meeting concerning stay of proceedings. She felt that the provisional nature of the relief available was already clear from paragraph (3) of article 15, but she had no objection to the point being specifically emphasized. The language suggested by the representative of France in relation to subparagraph 17 (1) (e) seemed to reflect the ideas expressed, but she wondered if it was sufficient to talk about preserving assets, rather than preserving the value of the assets, since there might be instances where selling the assets would be the only way to achieve that.

45. She also recalled the comments made by other speakers concerning article 17 (1) (c); there seemed no need to refer to that subparagraph.

46. **Ms. MEAR** (United Kingdom) said that, in the light of the discussions, she could agree that, in article 15, the relief available under certain paragraphs of article 17 should be modified in the light of the purpose of article 15. She also agreed on the need to protect the value of assets. With that understanding, an amendment along the lines of the French proposal was acceptable.

47. **Mr. GRIFFITH** (Australia) supported the suggestion that the text should refer to preservation of the value of assets. However, the reference in the representative of France's proposal to assets which might be removed from the control of the foreign representative would not meet the concern that had been expressed by his delegation. Perhaps the text could end with the reference to protecting or preserving the assets or their value.

48. **Mr. COOPER** (Observer for the International Association of Insolvency Practitioners) said that it was not just a matter of the disposal of assets; the administration of debtors' assets or affairs must also be covered. He recalled in that connection the example he had mentioned at the previous meeting of an enterprise in one country with a branch in another.

49. **Mr. TELL** (France) said that the proposed reference to "the relief provided for in article 17 (1), subparagraph (e)," would include administration.

50. **Mr. WESTBROOK** (United States of America) said that the representative of France should be commended for proposing a possible solution. He would be interested to know whether other delegations found it helpful in resolving their difficulties over article 15.

51. **Mr. OLIVENCIA** (Spain) welcomed the amendments proposed, and especially the express reference to the provisional and urgent nature of the relief. The amendment reducing the relief available under article 17 (1) (a) to stay of execution, which he understood to refer to execution against assets, was also satisfactory. With regard to the reference to subparagraph (b) of article 17 (1), he noted that the mention there of article 16 (1) (b) would make no sense in relation to article 15. Subparagraph (c) should not be included at that point. Regarding subparagraph (d), what was urgent was to protect books and documents of the debtor from the risk of destruction or disappearance. On subparagraph (e), he supported the proposal of the representative of France, on the understanding that it included administration, and subject to the inclusion of a reference to preservation of value.

52. **Mr. ABASCAL** (Mexico) said that powers of administration should not be granted. As an example, in an arbitration proceeding in which he was participating regarding a dispute in a joint venture, the minority partners were asking for the administration of the company to be placed in the hands of a third party. That would be to ignore Mexican company law. Too many interests could be affected in the management of a company, and the established rules on company management must be observed as long as there was no definitive recognition of the insolvency.

53. **The CHAIRMAN** asked whether any other delegations supported the position of the representative of Mexico that administration should not be covered under article 15.

54. **Mr. MAZZONI** (Italy) said that the representative of France's proposal seemed a good one and could remove his delegation's objections to article 15. However, he thought that wording should be added to the effect that the relief would be granted "subject to the limitations applicable to provisional measures". The reference would be to the limitations applicable in each enacting country on the scope of provisional measures. It was not a question of the circumstances in which the relief would be granted; a distinction must be made between the grounds for granting relief and the nature of the remedy, taking into account the rules applicable to "provisional relief", in the sense of "conservation measures" ("*mesures conservatoires*").

55. He shared the concerns of the representative of Mexico on the inclusion of powers of administration and of liquidation but, with the addition he had just proposed, the text was perhaps acceptable.

56. **Ms. NIKANJAM** (Islamic Republic of Iran) was satisfied with the present wording of article 17 (1) (e). For her country, a more general text would be preferable to one going into details, for example by referring to "perishable goods". Relief was in any case provisional, and administration would be under the supervision of the court, so there was no need to be more specific.

57. **Mr. GRANDINO RODAS** (Brazil) said that he supported the representative of France's proposal as originally made.

The meeting rose at 12.30 p.m.