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Thirtieth session

SUMMARY RECORD OF THE 618th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 20 May 1997, at 2 p.m.

Chairman: Mr. BOSSA (Uganda)

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The meeting was called to order at 2.10 p.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (*continued*) (A/CN.9/435; A/CN.9/XXX/CRP.3, CRP.7)

Article 22 (*continued*)

1. **The CHAIRMAN** said that a number of issues had been raised at the two preceding meetings regarding article 22, and particularly regarding paragraphs (1) and (2).

2. **Ms. SABO** (Observer for Canada) said that her delegation's proposal for additional language in paragraph (1) seemed to have attracted little support, and she could accept the views of other delegations in that regard.

3. The drafting group could perhaps consider the possibility of splitting article 22 into several articles.

4. **Mr. ABASCAL** (Mexico) withdrew his proposal to delete paragraph (2), and supported the proposal of the representative of France to restrict the presumption of insolvency to a foreign main proceeding.

5. **Mr. CALLAGHAN** (United Kingdom), referring to the addition proposed by the Canadian delegation to paragraph (1), agreed that it was essential for an insolvency representative to be able to sell a business as a going concern, even if the assets were in more than one State. Perhaps that point was satisfactorily covered by article 21; however, having listened to the comments of the Canadian delegation and the observer for INSOL, he thought that it would be useful for article 22 (1) to be clarified in the way proposed.

6. **Mr. GLOSBAND** (Observer for the International Bar Association) disagreed. Paragraph (1) of article 22 dealt with limitations on local proceedings, while article 17 (3), as it had been amended at the 614th meeting, did give powers of the kind in question to the representative of a foreign non-main proceeding if it was appropriate that his proceeding should encompass additional assets beyond the local assets. Those two concepts should not be confused. The scope of the local proceeding under article 22 should not be expanded.

7. **Mr. MARKUS** (Observer for Switzerland) said that he had some sympathy for the view that article 22 (1) might be too restrictive. He drew attention to the proposed paragraph (3) (c) (A/CN.9/XXX/CRP.3), dealing with the inverse situation: a foreign non-main proceeding concurrent with a local main proceeding. In that case, the restriction did not go so far. Some States might have difficulty in accepting a limitation on local non-main proceedings in paragraph (1) that exceeded that imposed on a foreign non-main proceeding in paragraph (3). He therefore proposed that the last part of paragraph (1), after the wording in square brackets, should be replaced by the words "only as a non-main proceeding". That would attenuate the limitation.

8. **Ms. LOIZIDOU** (Observer for Cyprus) said that she had a problem with the expression "the courts of this State have jurisdiction to commence a proceeding" in paragraph (1). It was interested parties that commenced proceedings, not courts. Secondly, she agreed with the addition proposed by the Canadian delegation. Thirdly, she had difficulty with paragraph (2), because as it was drafted a debtor would be presumed to be insolvent even though he might not have been found insolvent in the foreign State. In that case, the presumption would be unfair.

9. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that he favoured the use of the term "assets" in paragraph (1) rather than the term "establishment". Secondly, the text of paragraph (1) was very clear and the reference to "other property" proposed by the Canadian delegation was unnecessary.

10. He supported the proposal of the representative of France that paragraph (2) should refer to main proceedings.

11. **Mr. MAZZONI** (Italy) thought that it would be a good idea to have a chapter on concurrent proceedings consisting of several articles, as had been suggested.

12. Secondly, he supported the addition proposed by the Canadian delegation, for the reasons expressed by the observer for Switzerland. He would prefer the language proposed by the latter, but in any case the wording of paragraph (1) should be modified so as to take care of the point. To take into account the comments of the observer for Cyprus, the wording "a proceeding may be commenced" could be used. There should also be a reference to the possibility of a local proceeding entering into conflict with a foreign main proceeding previously recognized.

13. Regarding paragraph (2), he supported the proposal of the representative of France; the paragraph should begin: "Recognition of a foreign main proceeding".

14. Concerning paragraph (3) (a), he supported the suggestion to say that article 16 did not apply if the foreign proceeding was a main proceeding. He also supported the suggestion to use wording such as "consistent with the proceeding" or "in accordance with the proceeding", without the word "conduct".

15. He agreed with the observer for IBA that the phrase "falling under the authority of" in paragraph (3) (c) should be aligned with the decision taken on article 17.

16. Lastly, he supported the new paragraph (5) proposed in document A/CN.9/XXX/CRP.7.

17. **Mr. BERENDS** (Observer for the Netherlands) said that he saw very little support for his proposal that article 22 (1) should refer to an "establishment" of the debtor. However, his question as to how the provision constituted a restriction on the opening of a local proceeding in paragraph (1) had not been answered.

18. Secondly, he had much sympathy with the proposal of the observer for Switzerland to say that a local proceeding could only be a non-main proceeding once a foreign main proceeding had been recognized. However, there would need to be a definition of a non-main proceeding.

19. **Mr. SEKOLEC** (International Trade Law Branch) said that the question just raised had been discussed in the Working Group, and it had been recognized that there might not be much of a restriction, but it had also been said that the provision made clear that assets, at least, should be present, and insolvency proceedings could not be opened just for the benefit of creditors in the absence of assets.

20. **Mr. SHANG Ming** (China) supported the addition to paragraph (1) proposed by the Canadian delegation. He would have supported the proposal, which had been withdrawn, for the deletion of paragraph (2). The provision in that paragraph was related to article 16, concerning the effects of recognition. He wondered how it related to other parts of the text, and would welcome clarification from the Secretariat.

21. **Mr. SEKOLEC** (International Trade Law Branch) thought that the purpose of paragraph (2) was to avoid the need to prove what had already been established abroad. There had already been an insolvency proceeding opened, and the provision gave credit to the grounds which had served for the opening of that foreign proceeding. The aim was to facilitate the opening of insolvency proceedings in the enacting State.

22. **Mr. WESTBROOK** (United States of America) said he hoped that the lack of discussion of the proposed new article (5) (A/CN.9/XXX/CRP.7) was indicative of general support. He strongly supported it, since it was essential that courts should have full information when acting with respect to a foreign proceeding.

23. He thought that the proposal originally made by the Canadian delegation highlighted the need for coordination among proceedings. Presumably no one wanted the representative in a local non-main proceeding to compete with representatives in other countries; in that case, the concern related to coordination. He suggested that the words "to the extent necessary to implement cooperation or coordination under article 21" should be added at the end of the Canadian amendment.

24. **Mr. GLOSBAND** (Observer for the International Bar Association) said that, having listened to the discussion of the Canadian proposal, he thought it concerned essentially the same topic as had arisen in connection with article 17, namely the extent to which assets that should properly be within a non-main proceeding should be encompassed within the power of the representative of that non-main proceeding. He suggested amending the end of the paragraph to read: "the effects of that proceeding shall be restricted to assets that under the law of this State should be administered in that proceeding". That would mean that assets that were physically located in that State or should be located there but had been relocated, owing to fraud or error, would be encompassed in the proceeding.

25. **Mr. HARMER** (Observer for the International Association of Insolvency Practitioners) said that the present wording was overly restrictive. He supported the amendment proposed by the observer for IBA.

26. **Ms. SABO** (Observer for Canada) said that the proposal of the observer for IBA met her concerns. A reference to article 21 would also be useful.

27. **The CHAIRMAN** suggested that informal consultations should take place with a view to working out an agreed text for paragraph (1).

28. **Mr. MÖLLER** (Finland) said that the substance of the proposals of the representative of the United States of America and the observer for IBA were acceptable to him. He would be against a reference to main and non-main proceedings.

29. **Mr. TELL** (France) found the present draft of paragraph (1) satisfactory, but could accept wording along the lines of the Canadian, United States and IBA proposals. With regard to paragraph (2), his concern was that it should apply to the commencement of local non-main proceedings; recognition of a foreign main proceeding should allow opening of a local non-main proceeding as rapidly as possible. It was a dangerous idea that insolvency proceedings affecting an affiliate should be taken as evidence that the parent company was bankrupt.

30. Otherwise, he could accept article 22 with the amendments suggested.

31. **Mr. ABASCAL** (Mexico) said that he would like to make some more observations on paragraph (2) in response to the question raised by the representative of China. The paragraph introduced a presumption without establishing what its consequences would be. Under his country's law, the criterion for the opening of a collective proceeding was a generalized cessation of payments. The provision in paragraph (2) would have no meaning in his country and could only cause confusion. That was why he had originally proposed the deletion of the paragraph.

32. **Ms. MEAR** (United Kingdom) supported the Canadian amendment as modified by the representative of the United States of America. The suggestion made by the observer for IBA deserved consideration.

33. **Mr. MAZZONI** (Italy) proposed that, in paragraph (3) (b), the words "recognition or" should be inserted after the words "commences after", and the reference to article 16 should be deleted. After the text in square brackets at the end of paragraph (3) (b), the following should be inserted: "and if such proceeding is a local main proceeding, then any conflict between such proceeding and the foreign proceeding which cannot be solved by cooperation and coordination under article 21 shall be solved pursuant to article 13 or article 16 (2) by limiting the effects of the recognition of the foreign proceeding under the same rationale underlying, in the reciprocal case, the provision of article 22 (1)".

34. That proposal presupposed a definition of a local main proceeding; it also presupposed that article 13 would deal with the problem of an attack on the decision recognizing a foreign proceeding in the case of application for a local proceeding. It further presupposed that the provision would be in a separate article from article 22 (hence the reference to "article 22 (1)").

35. The result of his proposal would be that, if the attempt to coordinate left questions unresolved, they would be resolved by reference to article 13 or to article 16 (2) amended as agreed at the previous meeting. The aim was to create equality of treatment: under article 22 (1), recognition of a foreign main proceeding meant that a local proceeding must be in the nature of a non-main proceeding, with certain limitations stipulated. The same must be true in the inverse case: if the enacting State had jurisdictional grounds for opening a main proceeding, a foreign proceeding, even if previously recognized, and irrespective of the kind of recognition granted, must be treated as a non-main proceeding.

36. **Mr. OLIVENCIA** (Spain) said that article 22 was a key article and that the Commission would need time to consider the various proposals before it. The fundamental principle should be that, where there were concurrent proceedings, there should be coordination, cooperation and assistance; after that, consideration should be given to the specific cases. He was in general agreement with the arguments of the representative of Italy regarding the relationship between foreign and local proceedings. However, he also thought that, in paragraph (3) (a), the principle that the local proceeding took precedence should be expressed more forcefully by making the provision negative: instead of saying that "any relief ... must be consistent ...", the provision should say that "no relief may be granted ... that is inconsistent ...".

37. Like the representative of Mexico and others, he had reservations concerning paragraph (2). The proposed presumption could create serious problems because, in many legal systems, insolvency of the debtor was not the criterion for the opening of insolvency proceedings. Some systems relied on criteria such as cessation of payments, for example. As a last resort, however, he could accept the proposal of the representative of France.

38. **Mr. WESTBROOK** (United States of America) supported the suggestion made for clarifying the reference to article 16 in paragraph (3) (a) of article 22. The suggestion for the insertion of the words "recognition or" in paragraph (3) (b) was also helpful. He was less sure about the idea of deleting the reference to article 16 in paragraph (3) (b) unless it was agreed that the reference in article 16 (2) as amended was sufficient to allow the modification of the effects of article 16 as a result of the opening of a local proceeding. With regard to the insertion proposed by the representative of Italy at the end of paragraph (3) (b), he had assumed that paragraph (3) (b) was adequate, because it was understood that the local proceeding would be the controlling factor. To the extent that the proposal was intended to address the problem of modification of an earlier recognition, that was an issue for article 13. His delegation considered that such issues should be resolved under local rules.

39. **Mr. GLOSBAND** (Observer for the International Bar Association) said that article 16 (2) as amended allowed the modification of relief resulting from recognition, and the additional language proposed by the representative of Italy for article 22 (3) (b) seemed unnecessary.

40. With regard to article 22 (2), there seemed to be a number of countries which did not require the presumption of insolvency there, but it was an important issue for other countries that did require such a presumption to allow the commencement of proceedings. The text could be placed in square brackets and it could be explained in the Guide to Enactment that those countries that needed it should enact it, and those that did not need it need not do so.

41. As to whether the provision in article 22 (3) (a) should be stated in the negative, he could accept either that formulation or the present one.

42. **The CHAIRMAN** asked the Secretariat to summarize the amendments to article 22.

43. **Mr. SEKOLEC** (International Trade Law Branch) said that there were various partly overlapping proposals for the end of paragraph (1). The drafting group would have to consider how to marry those proposals.

44. In line with the proposal of the representative of France for paragraph (2), the words "foreign insolvency proceeding" in that paragraph could be replaced by the words "foreign main proceeding".

45. With regard to the *chapeau* of paragraph (3) (A/CN.9/XXX/CRP.3), the drafting group could consider how to amend it so as to say at the end that "the following shall apply".

46. To take into account proposals made for subparagraph (a), in the third line, the last part of the subparagraph, after the words "is filed", could be amended to read: "any relief under articles 15 or 17 must be consistent with the proceeding under ... and, where the foreign proceeding is a main proceeding, article 16 does not apply".

47. In subparagraph (b), the words "after the filing" could be amended to read "after recognition or the filing". Another comment had related to the use, in that subparagraph, of the word "relief" without distinction in reference to articles 15, 16 and 17. The drafting group could seek a way of using the word "effects" in reference to article 16.

48. The proposal of the representative of Italy for subparagraph (b) was a matter of substance. One view was that it should be considered in the context of article 13. The effect on subparagraph (b) would then be a matter of drafting.

(Mr. Sekolec, International Trade Law Branch)

49. In subparagraph (c), the words “falling under the authority of the foreign representative” would be replaced by the words “that, under the law of this State, should be administered in the foreign non-main proceeding”.

50. **Mr. ABASCAL** (Mexico) said that the proposal by the observer for IBA for an explanation in the Guide to Enactment that not all countries might need to enact the provision in paragraph (2) was useful. A similar approach had been adopted in connection with a provision in the Model Law on Electronic Commerce. The paragraph need not be placed in square brackets.

51. **Mr. MAZZONI** (Italy) suggested that, to take into account a useful point that had been raised in the debate, the words “the courts of this State have jurisdiction to commence a proceeding ... only” should be replaced by “proceedings can only be commenced in the State”.

52. **The CHAIRMAN** said that that suggestion could undoubtedly be accommodated.

53. **Mr. GRIFFITH** (Australia) said that he would not be in favour of making paragraph (2) optional, even if it was not necessary for some States. The inclusion of options, brackets, etc., in the model law should be avoided. He would support the amended version proposed by the representative of France, provided that it was not optional.

54. **Mr. SEKOLEC** (International Trade Law Branch) said that the Commission always strove to avoid square brackets. However, he thought that the idea was to leave the amended paragraph (2) in the text and merely to mention in the Guide to Enactment that some countries might not wish to enact the provision because it was not in line with their criteria for recognizing insolvency.

55. **Mr. ABASCAL** (Mexico) said that he had originally proposed the deletion of the paragraph. However, he could accept the amended text with an explanation in the Guide to Enactment. That approach had precedents in other model laws.

56. **The CHAIRMAN** said that there seemed to be agreement that paragraph (2) should be retained as amended, subject to the inclusion of an explanatory note in the Guide to Enactment that there were countries under whose legal system inclusion of the provision would be inappropriate.

57. Turning to paragraph (1), he invited the Secretariat to read out a new version that was suggested to take into account the points raised earlier.

58. **Mr. SEKOLEC** (International Trade Law Branch) said it was suggested that the paragraph should read:

> “Upon recognition of a foreign main proceeding, a proceeding may be commenced in this State under *[identify laws of the enacting State relating to insolvency]* only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor that are situated in the territory of this State and, to the extent necessary to implement coordination and cooperation under article 21, to other assets of the debtor that, under the law of this State, should be administered in such proceeding.”

59. **Mr. WISITSORA-AT** (Thailand) said that he had no objection to the wording suggested for paragraph (1). Regarding paragraph (2), either it could be placed in square brackets or there could be an explanation in the Guide to Enactment that States for which the provision was unnecessary could omit it.

60. **The CHAIRMAN** said he thought that there was general agreement that an explanation in the Guide to Enactment would meet the problem. He asked if he could take it that paragraph (2), as amended by the representative of France, was approved.

61. **Ms. LOIZIDOU** (Observer for Cyprus) said that the question was not whether paragraph (2) was necessary but whether it was acceptable. Under her country's law, when a bankruptcy petition was filed the court could appoint an interim receiver of the property of the debtor and direct him to take immediate possession of that property. At that point, from the point of view of other States, there would be a "foreign proceeding" as defined in article 2 (a). As a result an application might be made to the court in the enacting State, pursuant to article 13, to recognize that interim proceeding. If recognition was granted, the debtor, who had not even been adjudged insolvent in the foreign State, would be presumed to be insolvent in the enacting State. Her country could not accept a model law with that provision, and urged that it should be placed in square brackets.

62. **The CHAIRMAN** said that he thought that, even if a proceeding was called an "interim proceeding", the debtor would for all intents and purposes have been adjudged bankrupt.

63. **Ms. LOIZIDOU** (Observer for Cyprus) said that, in her country, the adjudgement of bankruptcy would come only at the end of the interim proceeding.

64. **Ms. NIKANJAM** (Islamic Republic of Iran) said that she found paragraph (2) a little confusing, but would go along with it. In paragraph (3), she assumed that the words "the conduct of", which were being deleted in subparagraph (a), would be similarly deleted in subparagraph (b).

65. **The CHAIRMAN** said that that was agreed.

66. **Mr. MARKUS** (Observer for Switzerland) said it should be borne in mind that nothing in a model law was mandatory. However, it would make the situation clearer if paragraph (2) were placed in square brackets.

67. **Mr. HERRMANN** (Secretary of the Commission) said that, in the past, model laws had sometimes contained series of options or footnotes. He was not aware of any precedent for using square brackets in a final text. Regarding the point raised by the observer for Cyprus, the problem would be a general one for the recognizing countries if an insolvency proceeding did not imply an adjudgement of insolvency. To put the provision in square brackets would not help in that regard; it would only help countries that did not need the provision.

68. **Ms. INGRAM** (Australia) said that, after hearing the Secretary, she thought that the Commission should consider whether paragraph (2) should be deleted or retained, not whether it should be placed in square brackets.. On a point of drafting, she had doubts about the proposed use of the phrase "under the law of this State" in paragraph (1).

The meeting rose at 5 p.m.