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Thirtieth session

SUMMARY RECORD OF THE 614th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 15 May 1997, at 2 p.m.

Chairman: Mr. BOSSA (Uganda)

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The meeting was called to order at 2.15 p.m.

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

Article 16 (*continued*)

1. **The CHAIRMAN** said that outstanding issues had been resolved at the previous meeting, and article 16 could be regarding as having been finally agreed on. It seemed to have been agreed to postpone discussion of paragraph (5) until article 22 was taken up; that might result in the paragraph being deleted.

Article 17

2. **Mr. SEKOLEC** (International Trade Law Branch) said that article 17, unlike article 16, dealt with relief that was discretionary—dependent on the assessment of a judge. It was thus similar to the relief under article 15. The difference between articles 15 and 17 was that the relief under article 17 was relief that might be granted upon recognition, whereas article 15 concerned relief that might be granted on application for recognition. Article 17 applied to both main and non-main foreign proceedings. However, paragraph (3) of article 17 said that, in the case of a foreign non-main proceeding, the court must be satisfied that the relief related to assets under the authority of the foreign representative or that any information sought was required for the purposes of the foreign non-main proceeding.

3. Paragraph (1) listed the various reliefs that might be granted. Paragraph (2) dealt with a situation where the court might consider it appropriate to authorize distribution of assets and attached the proviso that the court must be satisfied that the interests of creditors in the recognizing State were adequately protected.

4. **Mr. MAZZONI** (Italy) said that he supported the proposed text in general, but had doubts regarding paragraph (3), including the word “authority”.

5. **Ms. NIKANJAM** (Islamic Republic of Iran) said that she was generally satisfied with the content of article 17. However, she wondered if the measure provided for in paragraph (2) would be taken at the request of the foreign representative, as in the case of paragraph (1), according to the *chapeau* of that paragraph.

6. **Mr. SEKOLEC** (International Trade Law Branch) said he would assume that, if the court entrusted the distribution of part or all of the assets to the foreign representative or another person, it would be at the request of that person.

7. **Mr. KOIDE** (Japan) thought that mere reference to “distribution” was insufficient. The paragraph should also cover the transfer of the assets to the foreign State, and he proposed the insertion of the words “turnover or” before the word “distribution”. Secondly, the meaning of “assets falling under the authority of the foreign representative” in paragraph (3) was unclear. He suggested the wording “assets situated or having been situated in the foreign State and improperly removed”.

8. **Mr. SEKOLEC** (International Trade Law Branch) said that the word “authority” had been suggested by the expression used in article 2 (d), which spoke of the foreign representative being “authorized” to administer the reorganization of the debtor’s assets, etc. Regarding “turnover”, it was felt that the notion of “entrusting” encompassed the idea of turning over the assets. Perhaps it was just a drafting matter.

9. **Mr. CHOUKRI SBAI** (Observer for Morocco) thought that article 17, paragraph (1) (a), should be in line with article 16 (1) (a), as amended, and refer specifically to stay of execution.

10. Article 17 (1) (d) spoke of what had to be done to obtain evidence or information. That would be particularly useful if there might be perishable assets that would need to be sold rapidly. It should be possible to ascertain, on the spot, whether that was the case, and there might be a need for some sort of inquiry. He suggested that wording should be added to paragraph (1) (d) to provide for physical inspection of assets on the site or the conduct of inquiries regarding such assets.

11. **Mr. SEKOLEC** (International Trade Law Branch) agreed that the considerations expressed in favour of modifying article 16 (1) (a) to refer expressly to stay of execution probably also applied to article 17, so a consequential change could be made there. He recalled that the observer for Morocco's suggestion to include a reference to on-site inspection had already been put forward during the discussion of article 15.

12. **Mr. BERENDS** (Observer for the Netherlands) said that the idea behind articles 16 and 17 was that on recognition there were automatic effects, before the court had time to ponder the issue, and that once the court had had time to reflect, the relief requested under article 17 might be granted. Perhaps "Upon recognition" should be changed to "After recognition".

13. **Mr. ABASCAL** (Mexico) said that, in paragraph (2), the reference to the foreign representative being authorized to distribute all or part of the debtor's assets might be interpreted to mean that he could dispose of them at his own discretion. It would be desirable to say that he could distribute them in accordance with the law governing the insolvency proceeding in which he had been appointed or in accordance with the powers deriving from his appointment. With regard to the concern expressed by the representative of Italy, rather than speaking of "authority" the text should refer to assets which the foreign representative had been entrusted with administering.

14. **Mr. MAZZONI** (Italy) said that he was becoming more and more concerned, because it seemed that the proposition that no effects flowed from the recognition of a non-main proceeding was incorrect. Apparently, a very important effect was being given to recognition of a non-main proceeding. The foreign administrator in a foreign non-main proceeding was being given authority to administer assets, prior to any application for relief. In actual fact, relief was being granted because of recognition of the fact that the foreign administrator had power over or title to assets. He wondered on what basis it would be determined that he had that power: probably, the only basis would be the recognition of the foreign non-main proceeding. Would recognition of the foreign non-main proceeding mean that the foreign administrator's title to assets was recognized? That was the opposite of what he had understood regarding non-main proceedings; he thought that the effect of recognition was simply to give the foreign representative standing to request relief. It did not mean that his title to assets was recognized; that would mean giving substantive effects to the recognition of the foreign non-main proceeding.

15. **Mr. GLOSBAND** (Observer for the International Bar Association) said he thought it was implicit that no relief was granted automatically upon recognition, and that the foreign representative must make an application in order to obtain the right to take custody of assets. There would therefore be no difficulty in adding "at the request of the foreign representative" in paragraph (2), to make the intention clear.

16. On a subsidiary point, he drew attention to the definition of "foreign proceeding" in article 2 (a), which included the requirement that the debtor's assets must be subject to control or supervision by a foreign court. That limited the authority of the foreign representative.

17. **Mr. TELL** (France) said that article 17 as a whole was acceptable, but he was concerned that recognition of the foreign non-main proceeding could have substantial effects on local assets. He agreed that the meaning of "assets falling under the authority of the foreign representative" should be clarified, either in the text itself or in the Guide to Enactment.

18. **Mr. GLOSBAND** (Observer for the International Bar Association) said he thought that the purpose was to make it clear that any assets involved would be assets under the supervision of the foreign court in the non-main proceeding. In view of confusion over the meaning of "under the authority of the foreign representative", it might be better to refer to the foreign non-main proceeding rather than the foreign representative. The words "falling under the authority of the foreign representative" could be replaced by the words "subject to the control or supervision of the foreign court in the foreign non-main proceeding".

19. **Mr. CALLAGHAN** (United Kingdom) said that paragraph (2) could be expanded to make it clear that recognition did not mean that the court would simply hand over the assets: recognition gave the foreign representative the right to ask for relief, but he would still have to prove title to the assets.

20. **Mr. WESTBROOK** (United States of America) agreed that the recognition of a foreign non-main proceeding merely permitted the foreign representative to ask the local court for various forms of relief. Very often, the relief contemplated in paragraph (2) might not be available, but the foreign representative could request it. That point could be made clear. All were agreed that it was up to the local court.

21. **Mr. OLIVENCIA** (Spain) thought that subparagraph (c) of paragraph (1) might be better placed before subparagraph (f) as the penultimate subparagraph. Subparagraph (d) again raised the question whether a reference should be made to national law with regard to the obtaining of evidence. In subparagraph (e), "administration and" should become "administration or".

22. The wording of paragraph (3) was not very satisfactory. It would be better to speak of assets "under the control or supervision of the foreign court". He agreed with the point made by the representative of Italy.

23. The drafting of the Spanish version of article 17 needed some attention.

24. **Mr. BERENDS** (Observer for the Netherlands) said that he had doubts about the suggestion to refer in paragraph (3) to assets "under the supervision of the foreign court". That would mean that the court would have supervision over assets in another country. In fact, the assets were not supervised by the court but by the foreign representative, who in turn was supervised by the court. Perhaps a wording such as "subject to that foreign non-main proceeding" would be better.

25. **Mr. KOIDE** (Japan) said that it was not clear how far the effects of the foreign non-main proceeding extended with regard to assets. That must be made clear.

26. **Mr. MAZZONI** (Italy) thought that the way to preserve the spirit of the model law in paragraph (3) would be to allow the local court to decide which assets in the enacting State could be turned over on the basis of how the enacting State determined bankruptcy. He therefore suggested that "assets falling under the authority of the foreign representative" should be replaced by "assets whose inclusion within the assets administered or supervised under the foreign proceeding is justified". The assets were not supervised under the foreign proceeding at the time when relief was requested, but would be if the relief was granted, and the court in the enacting State would decide if that was justified under local law.

27. **Mr. WESTBROOK** (United States of America) said he thought that that approach was consistent with his understanding, and represented a helpful step forward.

28. **Mr. WIMMER** (Germany) said that his delegation could accept paragraph (3) as it stood. However, an alternative might be to refer to assets that had been improperly removed from the foreign State, as suggested by the representative of Japan.

29. **Mr. MAZZONI** (Italy) thought that it would be dangerous to refer just to illegal transfers. The court of the enacting State would have to determine the assets whose handover would be justified..

30. **Mr. SEKOLEC** (International Trade Law Branch) said that, following informal discussions, it was suggested that the words "falling under the authority of the foreign representative" in paragraph (3) should be replaced by the words "that, under the law of this State, should be administered in the foreign non-main proceeding".

31. **The CHAIRMAN** said that, if he heard no objection, he would take it that article 17 was approved with that amendment.

32. *It was so decided.*

Article 18

33. **Mr. SEKOLEC** (International Trade Law Branch) said that article 18 dealt with the obligation to give notice of the fact that a foreign proceeding had been recognized, and the text in the first set of square brackets referred to the possibility of additional notice of the effects of that recognition. The notice was to be given in accordance with the procedural rules for notice in a comparable situation—namely, the opening of local insolvency proceedings in the enacting State. It would cover all incidental matters, such as the cost of giving notice.

34. It had been understood in the Working Group that, where there was an obligation to give notice, the fact that it might not yet have been given did not affect the automatic consequences of recognition under article 16. There had previously been an express provision to that effect in article 18, but it had been considered superfluous.

35. **Ms. NIKANJAM** (Islamic Republic of Iran) noted the bracketed words "the commencement of" within the second set of square brackets. She would prefer a general reference to the procedural rules under insolvency laws.

36. **Mr. SANDOVAL** (Chile) generally agreed with the article. However, there were different types of notice even within insolvency proceedings. The reference should be specifically to notice of the opening of insolvency proceedings.

37. **Mr. AGARWAL** (India) said it was not clear if one notice was to be given or two, one of recognition and one of effects. If only one notice was meant, the contents of the notice would have to mention the effects under article 16. He wondered what that meant: would the notice have to specify all the proceedings stayed under article 16 (1) (a), for example? If it were left to the laws of the enacting State, the rules might differ, which would make it difficult to achieve uniformity.

38. **Mr. CALLAGHAN** (United Kingdom) was happy with the wording of article 18. The detailed contents should be left to the law of the enacting State.

39. **Mr. HARMER** (Observer for the International Association of Insolvency Practitioners), in response to the representative of India, said that uniformity was too much to hope for. Notice would be guided largely by the form of notice and the manner in which notice was given in each jurisdiction so that it could be most appropriate to the creditors and those affected in each jurisdiction. It would be best to keep the present wording.

40. **Mr. KOIDE** (Japan) shared the view of the representative of the Islamic Republic of Iran. Notice was required for the protection of local creditors; notice to the foreign creditors would be given by the foreign representative or the relevant court. Notice of recognition was different from notification of commencement of proceedings, dealt with in article 12. He proposed the deletion of the words "the commencement of".

41. **Mr. ABASCAL** (Mexico) said that it would be better to delete the reference to the commencement of a proceeding. That would correspond to the notice that would have to be given to the debtor when application was made for recognition of a foreign proceeding—something different from the notice referred to in article 18. The matter should be clarified in the Guide to Enactment.

42. **Mr. MÖLLER** (Finland) liked the article as it stood. It would not be possible to harmonize rules of notification. He would prefer the words "the commencement of" to be included. A general reference to procedural rules under insolvency laws might not be clear.

43. **Mr. SHANG Ming** (China) thought that the title of article 18, "Notice of recognition and relief granted upon recognition", should be aligned with the content.

44. **The CHAIRMAN** said that the drafting group would take care of that point.

45. **Mr. WISITSORA-AT** (Thailand) agreed that the means of notice could not be harmonized, and should be left to domestic law. However, notice of an application for recognition should also be required. Notice of application for recognition would give an opportunity to local creditors and those affected to challenge the application in court.

46. **Mr. HARMER** (Observer for the International Association of Insolvency Practitioners) said that that approach had been tried elsewhere, and had not worked. It was like giving the fox notice to get out of the hen house. Article 19 was there to protect local interests. He would strongly urge the Commission not to require notification of local parties before a hearing of the application for recognition. To do so would make the whole model law pointless.

47. **Ms. MEAR** (United Kingdom) agreed with the previous speaker. Such applications were by nature ones which should not have notice given of them before they were heard. They were by nature *ex parte*.

48. **Mr. WISITSORA-AT** (Thailand) noted that article 15 already allowed for urgent provisional measures. *Ex parte* applications for bankruptcy would be difficult for some countries to accept.

49. **Mr. CHOUKRI SBAI** (Observer for Morocco) supported article 18 as proposed. It was entirely in keeping with his country's procedure. The requirement for notice protected both local and foreign creditors.

50. **Mr. MAZZONI** (Italy) said that, for practical reasons, he could not support the proposal made by the representative of Thailand. However, he wished to remind delegations that in some countries, where bankruptcy involved constitutional principles, the "fox" would be heard before the court granted recognition.

51. **Mr. TELL** (France) was not much in favour of notification of the application, as that could compromise the main objective of the model law, which was the preservation of assets. In his country, in any case, there would be knowledge of an application.

52. **Mr. WIMMER** (Germany) thought that any unnecessary costs of proceedings should be avoided. In small bankruptcy cases, in his country, the most expensive item was notice. If there were only a few known creditors, perhaps they could be informed individually. The obligation to have full notification should not be created.

53. **Mr. SHANG Ming** (China) agreed with the representative of Thailand that notice should be given upon application. Article 15 provided for urgent provisional measures that would affect creditors. Under his country's law, there should be hearings, with the participation of the interested parties.

54. **Mr. ABASCAL** (Mexico) said that, in his country, as in Italy and probably other countries, it would not be possible to decide on recognition of a foreign proceeding without the application for recognition having been notified to the debtor. It was his understanding that the applicability of the provisions of articles 14 and 15 would be considered in an accelerated proceeding, prior to recognition.

55. **Mr. GLOSBAND** (Observer for the International Bar Association) suggested the inclusion in the Guide to Enactment of a statement to the effect that those countries whose laws would require notice of an application might wish to insert an appropriate provision.

56. **Mr. HARMER** (Observer for the International Association of Insolvency Practitioners) stressed that there was no wish to deny anyone information. It should be borne in mind that the debtor would already have been declared bankrupt in at least one other jurisdiction. It was just that speed was essential, whether the aim was to rescue a business or to collect disappearing assets. If several days' notice were required, the law would be made much less powerful. As for giving notice to the debtor, the applicant would probably at that stage be the legal representative of the debtor.

57. **Mr. TER** (Singapore) said that in his country, even in *ex parte* proceedings, the court could not proceed with the hearing without notifying interested parties. He assumed that article 18 would not preclude normal notices.

58. **Ms. LOIZIDOU** (Observer for Cyprus) said that, under her country's law, notice to the debtor was required prior to recognition of the foreign proceeding.

59. **Mr. DOYLE** (Observer for Ireland) supported article 18 as drafted. He could not agree that notice of application should be given. That would be impracticable and probably unwise.

60. **Mr. PUCCIO** (Chile) supported the position of the representative of Thailand on the need to give notice of application. He could not imagine due process without such notice, both of the application and of subsequent recognition.

61. **Mr. MÖLLER** (Finland) said he would be strongly opposed to notice of application. There were precedents in Europe even for enforcement orders granted *ex parte*. Notice of recognition was, of course, essential. He would prefer article 18 as it stood.

62. **Mr. HERRMANN** (Secretary of the Commission) said that some delegations had drawn attention to constitutional requirements for notice. That would be one of the points considered in preparing the Guide to Enactment. He would be interested to know whether the reference was to general constitutional rules on due process

or to rules that dealt expressly with the narrower context of application for recognition of foreign proceedings. In any case, if there was a constitutional requirement, perhaps a provision in the law was unnecessary.

63. **Mr. ABASCAL** (Mexico) said, in response to the Secretary's question, that in his country the authorities could not take action affecting rights without first having heard the person concerned. It was a matter of due legal process, and was set out in articles 14 and 16 of the Constitution.

64. **Ms. LOIZIDOU** (Observer for Cyprus) said that her country's Constitution included a general provision that, before a court issued a decision affecting the rights of a person, that person had the right to be heard in an open hearing.

65. **Mr. MAZZONI** (Italy) said that the principle of the right of defence was enshrined in his country's Constitution. It had been specifically ruled, in regard to bankruptcy, that no person could be pronounced bankrupt unless he was heard.

66. **Mr. PUCCIO** (Chile) said there was a general constitutional principle of due process in Chile, and a mechanism for appealing against acts violating that principle. It would be possible to appeal against a decision taken to recognize a foreign proceeding without those affected being notified.

67. **Mr. AL-NASSER** (Saudi Arabia) said that, in his country, there was as yet no law on cross-border insolvency, but the law on insolvency provided for notification.

68. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that although his country also did not yet have a cross-border insolvency law, there was a provision in domestic legislation that notification of the decision of the court must be published in the authorized journal for the publication of judicial notices as well as in the Official Gazette within eight days.

69. **Mr. SHANG Ming** (China) said that his country had no specific law on cross-border insolvency, but there was a State compensation law which provided that administrative bodies, courts, public security or police departments were liable to pay compensation in respect of damages caused. In the case of cross-border insolvency, article 15 could be applied, but it would be essential to give notice of the application, and such notice should be provided for in article 18.

70. **Mr. WESTBROOK** (United States of America) said that the concept of notice as part of due process was nearly universal. However, the method and timing of notice for different purposes varied greatly from one legal system to another. It had been recognized in the Working Group discussions that, in the case of application for recognition, the question of notice should not be covered in the model law and should be left to the constitutional principles and procedural rules of each country. Article 18 should be reserved for notice after recognition.

71. **Mr. COOPER** (Observer for the International Association of Insolvency Practitioners) endorsed what had been said by the representative of the United States of America. Article 18 was there to provide for notice after recognition. The question of notice of application could be left open, but article 18 was a helpful provision that could be universally applied.

72. **Mr. ABASCAL** (Mexico) said he wished to make it clear that his intention in his first statement had been along the lines of what the United States representative was now proposing: that the procedure relating to the application for recognition should be left to each country's procedural rules and that that should be stated in the Guide to Enactment.

73. **Mr. OLIVENCIA** (Spain) said that the model law did not regulate the recognition procedure. The procedure would be subject to the local law of the enacting State and to constitutional principles. The purpose of article 18 was to ensure that third parties affected by the act of recognition should be notified, in accordance with local law.

74. **Mr. AL-ZAID** (Observer for Kuwait) said that, in his country, notice of bankruptcy was given in local newspapers and the Official Gazette. With regard to article 18, the question of notice should be left to local law.

75. **The CHAIRMAN** said that article 18 dealt with notice after recognition of the foreign proceeding was granted. With regard to notice of application for recognition, the general view seemed to be that that should be left to local law.

76. **Mr. WISITSORA-AT** (Thailand) said that many delegations felt that notice should be given of application for recognition. He saw no harm in mentioning such notice in the article; it would, in any case, be subject to local law.

77. **Mr. GLOSBAND** (Observer for the International Bar Association) said that the issue had been discussed in the Working Group several times. It had been decided that there should be a reference to notice in the model law in two cases: notice to foreign creditors of local proceedings, and notice after recognition. All other procedural matters would be left to local law, as would be explained in the Guide to Enactment.

The meeting rose at 5.05 p.m.