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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirtieth session

SUMMARY RECORD (PARTIAL)* OF THE 627th MEETING**

Held at the Vienna International Centre, Vienna,
on Tuesday, 27 May 1997, at 2 p.m.

Chairman: Mr. BOSSA (Uganda)

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

** No summary records were issued for the 625th and 626th meetings.

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The discussion covered in the summary record began at 3.05 p.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (*continued*) (A/CN.9/435; A/CN.9/XXX/CRP.2/Add.1)

Article 19 *bis* (A/CN.9/435)

1. **Mr. SEKOLEC** (International Trade Law Branch) said that the actions covered by draft article 19 *bis* were what were sometimes referred to as "Paulian actions". Such actions, found in many legal systems, were of two types. One type of action was an action by a creditor who wished to undo a transaction by the debtor because the creditor felt disadvantaged. In civil law countries, such actions would be dealt with in civil or commercial courts. They were not intended to be touched on in article 19 *bis*. It was intended to be limited to actions that were available to an insolvency administrator. The question was whether such actions should also be made available to the foreign representative. The Working Group had discussed the issues at length, and he drew the attention of the Commission to paragraphs 62 to 66 of document A/CN.9/435.

2. **Mr. HARMER** (Observer for the International Association of Insolvency Practitioners) said it was generally felt that the utmost assistance should be given to persons appointed by courts. One of the major tasks of the administrator was to restore to the estate the assets that should be there for the creditors. Most laws provided for certain types of transactions to be set aside. The Model Provisions would not, without article 19 *bis*, give the foreign representative "standing" to attack transactions that sought to place assets out of reach.

3. **Mr. GRIFFITH** (Australia) supported article 19 *bis*, subject to some minor amendments which he would introduce. The provision merely concerned the standing of the foreign representative. It did not address any later consequences of his approaching the court. The position taken by the Working Group was succinctly stated in paragraph 63 of document A/CN.9/435. The prevailing view had been that the right to commence Paulian actions was essential to protect the integrity of the debtor's assets, in the interest of all creditors. The provision was intended to relate to the conferring of standing and not to the creation of substantive rights. A similar provision could be found in the 1985 Convention on the Law Applicable to Trusts and on Their Recognition.

4. Article 19 *bis* should deal only with standing. Of the two alternatives in square brackets, the words "has standing" should be retained instead of "is permitted". The italicized text should be shortened to "*[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors]*".

5. **Mr. WESTBROOK** (United States of America) said that, in the view of the commercial community in his country, the model law should not attempt to address the question of Paulian actions. Such actions were already available, and should be so, in the context of a local proceeding in the enacting State. Paulian actions, although common in many countries, differed widely in their characteristics. Although very important in preventing fraud and ensuring equality of distribution, they also had an enormous capacity to impact on innocent commercial transactions and disrupt commercial life. Often such actions were used to set aside ordinary payments to creditors in circumstances that would normally be considered perfectly proper, but were considered improper because they violated the principle of equality of distribution if they took place in certain periods before bankruptcy. Such time periods could vary widely, and were defined in various ways. The issue was very complex, and simply to award standing did not avoid the problem of complexity. Moreover, such actions were normally brought in the context of an insolvency proceeding, whereas the proposed text did not require that there should be a local proceeding. In many jurisdictions, that would mean that standing would be awarded in a kind of proceeding unknown to local law.

(*Mr. Westbrook, United States of America*)

6. In some countries, it was possible to bring an action to avoid certain acts detrimental to creditors outside an insolvency proceeding. The problem was that such rights were normally given to creditors, and to put the foreign representative in the same position as creditors would require an entire new structure of doctrine. In short, there was a risk of creating an unpredictable bundle of legal doctrine.

7. The proposals by the representative of Australia would leave the term "standing", which was ambiguous in many systems. The deletion of the words following "detrimental to creditors" would leave open whether the reference was to an action brought in the context of local insolvency proceedings or whether it was intended to give the standing that a creditor had in some jurisdictions to set aside actions detrimental to creditors without there being a local insolvency proceeding. That made the position even worse. It invited a sort of legal chaos. The issue was not a simple matter, and it would be imprudent to attempt to address it at that late stage, when many representatives had left. The United States was strongly opposed to article 19 *bis*, as originally drafted or as amended.

8. **Ms. NIKANJAM** (Islamic Republic of Iran) said that the issue was indeed complex and controversial, although it would be consistent to give the foreign representative rights equivalent to those of the local administrator. As a compromise, she wondered if discussion of the issue could be deferred until a later session of the Commission.

9. **Mr. MADRID PARRA** (Spain) supported article 19 *bis*, and expressed a preference for "has standing" rather than "is permitted".

10. **Mr. MARKUS** (Observer for Switzerland) said that he agreed with the representative of the United States that it was undesirable to complicate matters in the model law. However, the impact of the proposed article would be small, although important. It should be borne in mind that all the procedural and substantive conditions laid down in the enacting State would be left intact. It was simply a matter of ensuring that an action by a foreign representative was not rejected merely on the grounds that he was not a local administrator or other entitled person. It was most important to have such standing guaranteed for the foreign representative, as otherwise assets transferred to a third country might be completely lost to the creditors. He supported the retention of article 19 *bis* as drafted, with the amendments proposed by the representative of Australia. It would be unwise to make reference to the law of the enacting State, as such an allusion might be understood as a choice-of-law rule. He would prefer the words "has standing", but he could accept the expression "is permitted".

11. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that, in his country, acts detrimental to creditors could be rendered ineffective both before and after a declaration of insolvency. There were various types of possible proceedings, and the whole matter was complex. He would prefer the retention of the article, but suggested that the phrases "is permitted" and "has standing" should be replaced by "may". The whole of the italicized text in square brackets should be kept; it was vital to make reference to the law of the enacting State.

12. **Ms. MANGKLATANAKUL** (Thailand) supported the view of the representative of the United States of America that the issue of Paulian actions should not be addressed in the model law, as it was too complicated. In her country, the courts would be reluctant to allow such actions. She would like to see the article deleted.

13. **Mr. TER** (Singapore) said that he did not support the article, for the reasons given by the representative of the United States of America. In his country, such actions could be initiated, with proper safeguards under the legislation, only by the local administrator following commencement of bankruptcy proceedings.

14. **Mr. TELL** (France) said that he had no great difficulties with the proposed text. In most jurisdictions, the right to initiate Paulian actions was granted to representatives of creditors as well as the creditors themselves. The effect of the provision would be governed by the law of the enacting State. Compared with the extensive powers granted to the foreign representative under other articles, the scope of article 19 *bis* would be rather limited.

However, the text could perhaps be amended to read: "After recognition of a foreign proceeding, the foreign representative is entitled to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available according to the law of the enacting State in the context of insolvency proceedings in the enacting State]*. " It was important to refer to the law of the enacting State in order to make clear what law was applicable.

15. **Mr. RENGER** (Germany) and **Mr. BLOMSTRAND** (Observer for Sweden) supported article 19 *bis*, and associated themselves with the remarks of the representative of Australia and the observer for Switzerland.

16. **Mr. GRANDINO RODAS** (Brazil) said that, for the reasons advanced by the representative of the United States of America, and in the light of his own country's legislation, he would prefer the deletion of article 19 *bis*.

17. **Mr. AL-NASSER** (Saudi Arabia) supported the suggestion of the representative of the Islamic Republic of Iran to defer discussion of the article until the next session of the Commission, when there would be time to consider it properly.

18. **Mr. KONKKOLA** (Finland) considered that the article was important, and should be included in the model law with the amendments proposed by the representative of Australia. The purpose of the article was to indicate that access to justice was not to be denied solely because the plaintiff was a foreign representative.

19. **Mr. KOIDE** (Japan) said that he had no strong feelings about the article. However, he noted that it did not distinguish between foreign main and non-main proceedings. A proviso on the lines of article 17 (3) was needed.

20. **Mr. GRIFFITH** (Australia) proposed the following compromise text to accommodate the different views: "Upon recognition of a foreign proceeding, the foreign representative has standing to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors, that are available in this State to a local insolvency administrator]*." He agreed also with the representative of Japan regarding the need for a limitation along the lines of article 17 (3) in the case of a foreign non-main proceeding; the wording could be finalized by the drafting group.

21. **Mr. WESTBROOK** (United States of America) said that, as a matter of principle, he remained opposed to any such provision, but, on the understanding that the provision was to be narrowly understood, as he assumed would be explained in the Guide to Enactment, he could reluctantly accept the proposed text, with an addition to take into account the point raised by the representative of Japan.

22. **The CHAIRMAN** said he took that it was agreed that article 19 *bis* would be included in the model law with the wording proposed by the representative of Australia, subject to reference to the drafting group, which would meet again that evening and would incorporate the suggestion made by the representative of Japan.

Report of the drafting group (A/CN.9/XXX/CRP.2/Add.1)

23. **Mr. SEKOLEC** (International Trade Law Branch) drew attention to document A/CN.9/XXX/CRP.2/Add.1, which contained the results of the drafting group's attempt to implement the Commission's decisions. The articles had been renumbered. Regarding the title, it was suggested that the text should be called a "Model Law" rather than "Model Legislative Provisions".

24. *It was so decided.*

25. **The CHAIRMAN** reminded the Commission that the purpose of reviewing the text was not to reopen the debate but to ensure that the decisions taken were correctly reflected. He invited comments on the text.

26. **Mr. GRIFFITH** (Australia) commended the excellent work done by the drafting group. He asked why the word "Law" was underlined in some places—for example, in article 1—and not in others.

27. **Mr. SEKOLEC** (International Trade Law Branch) explained that underlining was intended to draw attention to the fact that a change had been made by the drafting group. In the final text, the underlining would be removed.

28. **Mr. RENGER** (Germany), referring to article 2 (f), wondered whether "human means and goods or services" should not read "human means, goods or services".

29. **Mr. SEKOLEC** (International Trade Law Branch) said the understanding of the drafting group had been that the reference was to "human means" accompanied by either goods or services.

30. **Mr. TELL** (France) wondered if article 7 should not be in chapter IV, on cooperation.

31. **Mr. SEKOLEC** (International Trade Law Branch) said that the thinking of the drafting group had been that the provision was of a general nature, being intended to indicate that, if there were any rights outside the present provisions under other rules in the law of the enacting State giving additional rights, those rights would be available. It had therefore been considered appropriate to place the provision in chapter I.

32. **Mr. TELL** (France) said that the French version of the *chapeau* of article 15 (2) should read: "*Une demande de reconnaissance doit être accompagnée*".

33. **Mr. WESTBROOK** (United States of America) said that article 18 (b) contained the phrase "in respect of the debtor", whereas in other instances the phrase "regarding the same debtor" had been used. It would be better to align the language.

34. *It was so decided.*

35. **Mr. GLOSBAND** (Observer for the International bar Association) suggested that, in article 20 (1), the word "foreign" should be inserted before the expression "main proceeding".

36. *It was so decided.*

37. **Mr. GRIFFITH** (Australia) asked if the article that had formerly been called article 19 *bis*, and had been adopted earlier in the meeting, would go after article 22.

38. **Mr. SEKOLEC** (International Trade Law Branch) confirmed that understanding.

39. **Mr. HARMER** (Observer for the International Association of Insolvency Practitioners), referring to article 28, said he thought that subparagraph (b) should logically be attached to subparagraph (a) and not be a separate subparagraph. The words "recognized in this State as" could be omitted. In the penultimate line of the present subparagraph (c), the word "foreign" should be inserted before the words "main proceeding".

40. **The CHAIRMAN** said that the drafting group would consider those points.

41. If he heard no objection, he would take it that, subject to possible further drafting refinements, the text of the Model Law in document A/CN.9/XXX/CRP.2/Add.1, as a whole, was approved as amended.

Other matters

42. **Mr. BLOMSTRAND** (Observer for Sweden) suggested that the Commission might consider how to monitor the implementation of the Model Law, and might encourage the Secretariat to collect information on its enactment in the various States, perhaps in cooperation with other organizations such as INSOL.

43. **Mr. HERRMANN** (Secretary of the Commission) said that the Secretariat planned to submit, at a later meeting, a draft decision by which the Commission could adopt the Model Law, following the same practice as with other model laws. That would be accompanied by an expression of appreciation for the contribution made by experts from organizations such as INSOL and IBA. He wished to take that opportunity to thank the experts in question very sincerely for their help in preparing the Model Law and for all their valuable cooperation with the Secretariat. He was confident that the close cooperation with INSOL and IBA would continue during the next stage of the work, including the monitoring of the enactment of the Model Law and the exchange of experience—for example, through the holding of further judicial colloquiums.

44. **Mr. MADRID PARRA** (Spain) said that his delegation wished to propose that, once the Model Law had been adopted, the Commission should extend its work to the preparation of model provisions for international treaties on cooperation and judicial assistance in cross-border insolvency. Such treaties were superior to national law. UNCITRAL should encourage States not only to adopt national laws but also to conclude bilateral and multilateral treaties on the subject.

45. **Mr. BURMAN** (United States of America) associated himself with the appreciation expressed by the Secretary for the work of INSOL and IBA. He hoped that the Commission would continue to invite non-governmental organizations to participate in its work when appropriate.

46. **Ms. NIKANJAM** (Islamic Republic of Iran) expressed appreciation for the work of the observers from INSOL and IBA.

47. **Mr. WESTBROOK** (United States of America) said that a special Commission had been established in his country to consider changes to insolvency law, and it would now take account of the Model Law.

48. **Mr. HERRMAN** (Secretary of the Commission) suggested that discussion on the proposal of the representative of Spain should be deferred until the next meeting. The Commission should perhaps consider carefully the timing of a decision to prepare model treaty provisions.

The meeting rose at 5.30 p.m.