UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.610
25 June 1998

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirtieth session

SUMMARY RECORD OF THE 610th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 13 May 1997, at 2 p.m.

Chairman: Mr. BOSSA (Uganda)

CONTENTS

V.97-24556

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.4)

Article 15 (*continued*)

1. **The CHAIRMAN**, summarizing, said that one issue before the Commission was whether to maintain article 15 as contained in document A/CN.9/435, which made all the reliefs available in article 17 available on application for recognition, or to adopt, for example, the proposal of the Italian delegation under which it would not be possible to grant all those reliefs. Other possibilities were: to make all the reliefs contained in article 17 (1), subparagraphs (a) to (d), available in the situation envisaged in article 15, but not that in subparagraph (e); to provide that arbitration proceedings could not be stayed; and to provide that proceedings could not be stayed, but only execution. The issue of the competent court also remained to be resolved.

2. **Mr. GLOSBAND** (Observer for the International Bar Association) thought that the reliefs available under articles 15, 16 and 17 should be granted by the court in article 4.

3. As far as the proposal of the representative of Italy was concerned, his Association favoured the broader availability of provisional reliefs in article 15 as currently drafted. It was hard to see how the position of the representative of Italy might be accommodated without seriously diluting the value of the law. He thought the Commission should proceed on the basis of the text as drafted, on the understanding that the provision might have to be adapted by the enacting State, as in the case of Italy.

4. **Mr. WESTBROOK** (United States of America) welcomed the degree of consensus on article 15 as drafted by the Working Group. Discretionary provisional reliefs were important in insolvency cases, where even a brief delay might prejudice creditors and others. He agreed with the observer for the International Bar Association that the text should not be changed radically because of a problem affecting one country.

5. Although he was against the designation of the court referred to in article 4 as the competent court, he urged the Commission not to delve too deeply into the question of designating local jurisdiction. There should be a discussion in the Guide to Enactment of the problem of provisional relief. In his country, only one court would probably be involved, but in other countries that might be inappropriate or difficult to achieve. It was a matter for the legislator in each country.

6. **Mr. WIMMER** (Germany) shared the views of the previous two speakers on the issue raised by the representative of Italy. He also agreed that the designation of the competent court was a matter of local procedural law.

7. The representative of Spain had raised another problem concerning article 15. In his country, there was a distinction between interruption of enforcement measures and interruption of a pending lawsuit. When a proceeding was opened, the court could decide that individual enforcement must be stopped. He suggested, as an option, limiting the scope of article 15 (1) in respect of the relief mentioned in article 17 (1) (a). That would not prevent those Member States that wished to go further from doing so.

8. **Ms. INGRAM** (Australia) strongly supported the thrust of article 15, which must refer to the minimum reliefs available under article 17. In cases of urgency, liquidators needed certainty. They must know what reliefs were available to them. Those listed in subparagraph (a) were precisely those measures required to prevent

(*Ms. Ingram, Australia*)

dissipation of assets. However, article 17 relief was only discretionary. Under article 19, the court could tailor the relief, and she felt that article 19 should meet the concerns expressed by some delegations about pending proceedings. The court needed flexibility, but the minimal list should not be abandoned. The aim of the model law was to set an example. Some countries might need to modify their legislation, but did the Commission want a good law or simply the lowest common denominator?

9. She agreed with those who thought that the designation of the competent court was a local matter. Perhaps there should be a note in square brackets asking the enacting State to nominate the competent court in its jurisdiction.

10. **Mr. ABASCAL** (Mexico) said that the principle reflected in article 15 was in line with Mexican legislation. However, he had problems with the extension to article 15, where what was concerned was a mere application for recognition of a foreign proceeding, of all the possibilities covered in article 17. He supported the view that the provision in article 17, paragraph (1) (a), should not permit interference with pending proceedings as such; only execution should be stayed, in order to avoid dispersion of the debtor's assets.

11. Paragraph (1) (d) of article 17, in the context of a mere application for recognition, might be interpreted as allowing for a kind of "pre-trial discovery" procedure before a decision had been taken on recognition; that might give rise to much opposition in his country.

12. Paragraph (1) (e) of article 17 might open the door to the sale of assets without due legal process.

13. **Mr. BLOMSTRAND** (Observer for Sweden) said that the provisions were important. The current law in his country did not provide for collective reliefs of a provisional nature, but he shared the view that measures of a collective nature could be accepted in such circumstances. Moreover, the scope of the provisional relief available under article 15 (1) was limited to cases where it was necessary to protect the assets of the debtor or the interests of creditors. As had been said, the safeguards in article 19 must also be taken into account. He was happy with article 15 as drafted by the Working Group.

14. He agreed that the competent court was a matter for each enacting State. Finally, he shared the general concerns expressed concerning stay of proceedings. That matter needed to be addressed, though not necessarily in article 15.

15. **Ms. MEAR** (United Kingdom) said she was very much in favour of keeping article 15 as drafted. She would be opposed to any narrowing of article 15 (1). There seemed to be little support for the alternative text proposed. The essence of article 15, as also of article 16, was the availability of fast and flexible relief to deal with emergency situations, and she supported the present structure of articles 15, 16 and 17.

16. On the question of stay of arbitration proceedings, she saw no real distinction, once proceedings had commenced, between arbitration and the resolution of disputes in the courts, other than that arbitration was consensual in origin while judicial proceedings were not. The discretionary nature of article 15 would permit a court to allow court action or arbitration to continue. On the choice of court, she had understood article 4 to apply generally, but agreed with those delegations which felt that the Commission should not delve too deeply. Ultimately, it was a matter for internal procedural rules.

17. **Mr. MÖLLER** (Finland) generally agreed with article 15. The fact that collective provisional measures did not currently exist in his country was not, for him, a problem. He agreed that the designation of the competent court should be left to each State. He had the same problem as the representative of Germany and others concerning

stay of individual actions under article 15, because in Finland even local insolvency proceedings did not mean that individual actions would be stopped. The provision should only apply to execution measures.

18. He was puzzled by the representative of Mexico's interpretation of article 17 (1) (d) as allowing for some sort of "pre-trial discovery". He understood the provision as allowing the taking of evidence—naturally in accordance with local law. Regarding the realization of assets under article 17 (1) (e), in his country that would be limited to perishable goods. But the conditions of realization would be governed by local law, so he saw no problem.

19. **Mr. SEKOLEC** (International Trade Law Branch), responding to the suggestion that the Commission should not delve into the question of the jurisdiction of courts, pointed out that, under article 4, it would be for the enacting State to designate the courts competent to perform the various functions involved. The idea of including a reference in article 15 (1) to article 4 would be to make it clear that the term "court" in article 15 did not have a broader coverage than the courts mentioned in article 4. If it was intended that article 15 should have a broader scope, that was a matter of substance, but the current text did not answer the question.

20. **Mr. BERENDS** (Observer for the Netherlands) wondered whether it would be acceptable to the representative of Italy for his position to be accommodated in a footnote. He endorsed the proposal of the representative of Germany that there should be an option to exclude stay of proceedings from article 15.

21. **Mr. CHOUKRI SBAI** (Observer for Morocco) believed that article 15 was formulated appropriately. In his country, proceedings in matters of insolvency were collective proceedings, and the administrator of the insolvency proceeding alone could commence proceedings. The provisions proposed by the representative of Italy might fit Italian national law, but not that of other countries. He was therefore in favour of maintaining article 15 as drafted, although some details might be considered later in the context of article 17.

22. **Mr. MAZZONI** (Italy) said that he understood the need for consensus, and would not withhold his consent to the text if at least one of two alternatives could be accepted. From the beginning of the work in the Working Group it had been accepted that, in certain circumstances, a system of options might be used. The present case seemed to be a perfect example. Alternatively, the footnote technique had been suggested. That would seem acceptable, provided that the footnote stated clearly, firstly, that countries that did not have collective measures prior to recognition or the commencement of local proceedings were free to replace the provision in article 15 with reliefs available under local law and, secondly, that even if countries accepted article 15, they were free to reduce the list in article 17.

23. The issue of the competent court was a matter of substance, not just drafting. If any court were permitted prior to recognition of a foreign proceeding to make an order for the stay of proceedings or freezing of assets, that would be a very radical and totally new power for courts in many States. He wondered if those delegations which had indicated that the proposed new powers for courts caused them no concern had considered the possibility that conflicts might be created among courts in their countries. If article 15 could refer to courts other than the competent court under article 4, that might mean a serious modification of the local procedural system.

24. **Mr. ABASCAL** (Mexico) said he had found the statement of the representative of Finland very interesting, but wished to point out that, if any meaning was to be given to article 17 (1) (d), it granted very broad powers concerning information that the debtor had to provide, since it spoke of the supply of information concerning the debtor's assets, affairs, rights, obligations or liabilities. It seemed to him a very good idea that the right to sell goods should be limited to perishable goods, understood to include those liable to lose their value rapidly, such as fashion garments.

25. **Mr. MÖLLER** (Finland) said, concerning 17 (1) (d), that he thought it would not allow "pre-trial discovery" in the sense of "fishing expeditions" where the documents to be delivered were not specified. In any case, his understanding was that the taking of evidence would always be in accordance with local law.

26. **Mr. AGARWAL** (India) said that there was a slight conflict between articles 4 and 15 on the question of the court. Article 4 required specification of a court, while articles 15 and 17 could refer to any court. The matter should be left to domestic legislation. A debtor might be in one city, and the court or authority specified under article 4 in another, distant place. It might be difficult for the foreign representative and the debtor to attend the proceedings.

27. **Mr. TELL** (France) thought that the administration and realization of a debtor's assets should be possible only after a decision had been taken to recognize a foreign proceeding. His proposal was that article 15 should refer only to subparagraphs (a) to (d) of article 17 (1). The objective of article 15 was to protect the assets and interests of the debtor and the creditors, and that could be fully achieved by the reliefs in article 17 (1) (a) to (d). If there was no consensus on restriction of the reliefs in article 15 to those in article 17 (1) (a) to (d), article 15 should at least be amended to require the court hearing an application for recognition to take into account the restrictions set out in article 17 (3) before authorizing measures such as seizure or realization of assets. For the same reasons, he shared the concerns expressed by others related to stay of proceedings. A wording could perhaps be found that would provide for the possibility of limiting the stay to execution.

28. **Mr. WESTBROOK** (United States of America) said that it was quite true that, early in the discussions of the model law, in Vienna two years earlier, the "menu" or option approach had been discussed. Since then the Commission had been much more successful in finding common ground than had been anticipated at the outset. It had been realized that including particular options would lead to difficulties in the adoption of the model law by making it too complex. A consensus had emerged in the Working Group that options should not be included unless there was broad, though not majority, support for a position or a widespread need for a provision to allow the adoption of the model law. It had always been agreed that it might be necessary in some countries to adjust the text to meet procedural or particular difficulties. That was not the same as including an option or menu in the model law. When there were two options, the suggestion would be that either option was equally good, and that would encourage non-uniformity. In that light, he had not seen sufficient support for the representative of Italy's proposal to justify the inclusion of an option. Nor was he sure that an option or footnote was needed to cover the question of stay of proceedings.

29. His delegation did not contemplate any sort of "pre-trial discovery" under article 17 (1) (d), which only listed areas of information that might be included in an examination under local procedures.

30. **Mr. CALLAGHAN** (United Kingdom) said that, in considering article 17 in the light of article 15, it should perhaps not be forgotten that the purpose was to freeze the position for the foreign representative when he applied for recognition. To do that, the reliefs provided for under subparagraphs (b) and (d) of article 17 (1) would definitely be needed, and that provided for under subparagraph (e) might be needed if the debtor had

(Mr. Callaghan, United Kingdom)

perishable assets. If that possibility were not available, what could be done, for example, in the case of foodstuffs? In any case, all reliefs were at the discretion of the court.

31. **Ms. NIKANJAM** (Islamic Republic of Iran) agreed with the representative of the United States of America that article 15 should remain as drafted. It covered all the needs for provisional relief. She felt that article 17 placed too much power in the hands of the foreign representative, but as long as the courts had discretion she would not oppose it. The competent court was a matter for the enacting State and there was no need for further specification in the text.

32. **Mr. COOPER** (Observer for the International Association of Insolvency Practitioners) said that he understood the concern of the representative of France regarding the application of article 17 (1) (e) to provisional relief. But there might be circumstances where perishable goods, for example, should be immediately sold. There was also the case of an enterprise insolvent in one country, with an operation in another country. The management in the latter country might have walked out because of what had occurred in the home office. Something needed to be done to protect the interests of creditors, and that was only possible if an administrator was appointed—the foreign representative or a person designated by the court. The court could keep control by appointing a local person. In his experience, even in countries considered more adventurous in providing such types of interim relief, such as Australia and the United Kingdom, judges would look very carefully at an application to dispose of property at a very early stage, and not simply rubber-stamp an order to that effect. He would not like to see a fragmentation of article 15 because of hesitation over the inclusion of one or more of the article 17 reliefs. In his view, it was safe enough to include all those reliefs.

33. **Mr. GLOSBAND** (Observer for the International Bar Association) shared the views of the representatives of the United States of America and the Islamic Republic of Iran. He emphasized that article 15 was designed to deal with emergencies. Typical emergencies at the beginning of insolvency proceedings did require immediate protection of assets and access to information. To deprive the foreign representative of the possibility of obtaining protection at the start might deprive him of all relief. In the context of emergency relief, in all jurisdictions he was familiar with, courts took very seriously any imposition on other parties, and weighed carefully the information about the emergency and the need for protection.

34. Regarding the administration of assets, as had been pointed out, concern about uncontrolled power granted to a foreign representative was met by the fact that the administration could be entrusted to some other person designated by the court.

35. **Mr. GRIFFITH** (Australia) stressed that the Working Group's view had been that it would be appropriate for the model law to provide a better regime than that prevailing under the present domestic law of particular States. The Commission should accept that its role was to make the world a better place. The purpose of drafting the model law was to enhance domestic law in States in respect of cross-border insolvency, and the view of the Working Group had been that the Commission should produce a model law, not a menu of options.

36. It seemed to him that particular weight should be given to the views of the professionals from INSOL and IBA, particularly bearing in mind that the current exercise had arisen out of an initiative by INSOL. Another point to be stressed was that the aim of article 15 was to provide an exceptional remedy to protect the assets of a debtor and thus the interests of the creditors, for example in the case of perishable foodstuffs. As had rightly been pointed out, the proposed powers would, in any case, lie in the hands of local courts. Some civil law

(Mr. Griffith, Australia)

jurisdictions, if the model law vested such powers, might be more conservative in exercising those powers than was the case in countries where there was an innovative use of such powers. But it was appropriate that powers necessary to protect assets should be brought into existence, and there seemed to be very strong practical reasons why powers of the sort listed in article 17 (1) should be available, as an exceptional matter, under article 15. That being so, he submitted that the existing text should be supported unless there was a clear and substantial body of opinion that such provisions would not work by reason of some principled inhibition in a substantial number of States, and he strongly urged that the provisions should remain as a single text, without options or footnotes.

37. **Ms. UNEL** (Observer for Turkey) said that she shared the concerns expressed by the representatives of Italy and France. Foreign creditors should not be preferred *vis-à-vis* local creditors. Equality of treatment was a very important principle.

38. **Mr. MÖLLER** (Finland) agreed with the representatives of the United States of America and Australia that the options approach should be avoided. Regarding the stay of individual actions under article 15, he wondered whether it would not be enough to stay execution, allowing proceedings to continue. Even though an application to stay proceedings would not be automatically granted, if the provision existed there would presumably be some situations where the court would order a stay. It was most important for his delegation that the model law should be acceptable to the legislator in Finland.

39. **Mr. OLIVENCIA** (Spain) said he did not think that it was appropriate to make a "block" reference in article 15 (1) to article 17, because articles 15 and 17 related to different situations. Unlike article 17, article 15 should be limited to provisional, urgent measures.

40. Stay of proceedings under both article 15 and article 17 should be limited to stay of execution. It should be possible for proceedings to be initiated and continued to the point of decision, but not executed. That should be clearly stated.

41. Where interpretations differed, as with regard to article 17 (1) (d), which according to the representative of Mexico would cover "pre-trial discovery" but according to others would not, the intention should be expressed clearly in the model law. As applied under article 15, the provision should cover only urgent measures. The delivery of information was not urgent. It would be enough to ensure the security of documentation, so that documents could not be removed, concealed or destroyed. The foreign representative or another person should be entrusted with their safekeeping.

42. The same consideration applied to article 17 (1) (e), which had been interpreted in various ways. It should be made clear that it referred to perishable goods, or goods that might lose their value. It was not a matter of liquidation, but of conversion into money of assets consisting of perishable goods so as to preserve their value. The purpose of the relief in article 15 was conservation.

43. **Mr. WESTBROOK** (United States of America) explained that the reason for providing for stay of proceedings was that, in many cases, the debtor, without money to pay lawyers, was unable to defend some actions, and judgement could be given against him by default, something that could be difficult for the liquidator to reverse following the bankruptcy of the debtor. That was a serious issue in the context of articles 16 and 17. In the case of article 15, however, he took note of the concerns expressed by the representative of Finland and others and, although he still had difficulties, agreed in the context of provisional remedies that there was less

(Mr. Westbrook, United States of America)

likelihood of serious prejudice in the short period between application for and granting of recognition. Some limitation, as suggested by the representative of Germany, would not be too serious. Perhaps a text could be worked out in informal consultations.

44. **The CHAIRMAN** suggested that the representatives of France, Finland and Germany should assist the representative of the United States of America in drafting an appropriate text for consideration by the Commission.

45. Summarizing, he said he thought that there was a general consensus that article 15 should remain as drafted, subject to a decision on the point last mentioned. The view that the relief under article 17 (1) (e) should be confined to assets of a certain type did not seem to be widely supported. The position of the Italian delegation had also received little support. That delegation's view would be covered in the report of the proceedings but there should not be an option inserted in the text, because the guiding principle was that the menu approach should only be adopted when there was a substantial minority opinion. The prevailing view on the reference to the court was that it should be left to the enacting State to specify which court should handle the matter, although there would be an opportunity to take that subject up again during the consideration of article 4.

46. **Mr. ABASCAL** (Mexico) said that, in article 17 (1) (d), it should be made clear that the measures provided for must take place in accordance with local procedural rules. In informal consultations, the representative of the United States of America had expressed his agreement with that and, as the representative of Spain had said, where there was any doubt it was desirable that the text should clarify the matter.

47. It would be no solution to provide an explanation in the Guide to Enactment, since that document would not constitute a commentary or have the force of law. The point must be dealt with in the text of the Model Provisions.

48. **Mr. MAZZONI** (Italy) said that his delegation would not approve article 15 in its present form unless at least a footnote indicated that, for those States that did not have collective reliefs prior to recognition, the way was open to limit relief to provisional reliefs available to individual creditors. If that was not acceptable, he wished to place on record the opposition of his delegation to article 15.

49. **The CHAIRMAN** said he would like to hear the views of members on his ruling that the proposal of the representative of Italy had not received sufficient support and should therefore be covered only in the report, and on the representative of Italy's view that there should be at least a footnote to article 15.

50. **Ms. SABO** (Observer for Canada) was satisfied with article 15 as currently drafted. With articles 13, 14, 17 and 19, it represented a successful effort to meet the concern, at the forefront of many of the discussions in the Working Group, to ensure that appropriate relief was speedily available without allowing the foreign representative to obtain inappropriate or unfair reliefs. However, subject to seeing draft texts, she could accept the compromise solutions with respect to subparagraphs (a) and (d) of article 17 (1) along the lines proposed.

(Ms. Sabo, Observer for Canada)

51. Concerning the representative of Italy's proposal, it had been her delegation's view all along that, where possible, a menu of options should be avoided. Where delegations could achieve a compromise, they should seek to do that rather than simply providing widely differing alternatives. In the case of a variant which would seem to be tailored to only one or just a few jurisdictions, providing for an option or a footnote would be a dangerous disincentive to States which, it was hoped, would enact the Model Provisions, and encourage them to take the easiest course rather than move towards greater uniformity.

52. **Mr. BERENDS** (Observer for the Netherlands) said that he did not like options, but it was better to have consensus on a text with options than no consensus without options, or consensus on a text with hidden options. He did not agree on the substance with the Italian delegation, but would not be against reflecting that delegation's view in a footnote. He welcomed the proposal from the representative of the United States of America concerning the reference to article 17 (1) (a).

53. **Mr. GRIFFITH** (Australia) said he understood the representative of Italy's position, but the fact that that view had been strongly reiterated was not enough to justify an exception. It was not the practice of UNCITRAL to state individual reservations in its report, which indicated the general thrust of views but not the stands of individual States. UNCITRAL always operated by consensus, which meant not unanimity but a readiness to go along with views that were not one's own. In the case of international arbitration, for example, common law and civil law lawyers had moved closer together and common law lawyers had been able to enact a text which was working effectively. There should therefore be no footnote.

54. **Mr. ENIE** (Observer for Gabon) said that a footnote to article 15 would set a precedent for footnotes to other articles. Should not the present text, which was flexible, be left as it stood? Alternatively, other proposals could be considered too.

55. **The CHAIRMAN** said there was consensus that the reference in article 15 to article 17 (1) (a) would be redrafted in informal consultations. He sought guidance on the suggestion that the position of the representative of Italy should be included as an option or in a footnote.

56. **Mr. ABASCAL** (Mexico) said that footnotes were not a good idea, but that if the representative of Italy had objections of substance they would have to be taken into account; the Italian proposal would probably have to be mentioned in a footnote.

57. **Mr. BURMAN** (United States of America) said he was most concerned at the suggestion that, even though a substantial majority was in favour of one direction, a small body of dissenting opinion should be granted a footnote. It was crucial to the Commission to work on a basis different from that of "consensus" in the sense of everyone having to be included: the tradition was that a substantial majority was recorded as the "prevailing view", and that all delegations had to live with that. It was not appropriate for any country with a particular problem to expect the Commission to accommodate that problem; otherwise, nothing useful could be accomplished by the Commission. All must be willing to accept the prevailing view when there was a strong enough majority.

58. **Mr. MAZZONI** (Italy) said that he fully respected the views of other delegations on the traditional methods of working, but there were cases where a country requested its opposition to be placed on record. He simply could not give Italy's approval to the proposed provision. He reiterated that, if a footnote was not possible, he would oppose article 15.

The meeting rose at 5 p.m.