UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.615
25 June 1998

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirtieth session

SUMMARY RECORD OF THE 615th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 16 May 1997, at 9.30 a.m.

Chairman: Mr. BOSSA (Uganda)

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V.97-24592

The meeting was called to order at 9.40 a.m.

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

Article 18 (continued)

1. **The CHAIRMAN** said that the main issue that had emerged from the discussion so far was whether to leave article 18 basically as it stood or whether to expand the scope of the notice. He asked the representative of Thailand to repeat his proposed amendment to article 18.

2. **Mr. WISITSORA-AT** (Thailand) proposed that article 18 should begin: "Notice of application for recognition and notice of recognition of a foreign proceeding shall be given in accordance with … ".

3. **Mr. MÖLLER** (Finland) was not in favour of the amendment, as it was a matter for each State. He saw no reason why other States should be obliged to require notice of application for recognition. They should be free to allow *ex parte* proceedings.

4. **Mr. CHOUKRI SBAI** (Observer for Morocco) thought that a requirement for notification prior to recognition was undesirable for two reasons: firstly because it would be expensive and secondly because the request for recognition might be rejected. He saw no need to amend article 18.

5. **Mr. HARMER** (Observer for the International Association of Insolvency Practitioners) had problems with the suggested amendment; the only consequence would be to suggest to all nations that notice must be given before application. If the text said that notice of application was to be given in accordance with local law, where there was no local law the implication would be that notice must be given. Silence in the model law, on the other hand, would not preclude any nation from requiring such notice. The proposed provision did not say that the only notice was notice of recognition, but simply specified the practical minimum. He urged the Commission not to go further, as that would render the law useless.

6. **Mr. WIMMER** (Germany) said that he was opposed to the amendment because it would cause unnecessary costs. In any case, article 18 was not necessary for the goal being pursued in the drafting of the model law. He was confident that each country would adopt the provisions necessary to protect local creditors. He suggested deleting article 18, or wording it so as to leave the matter to the discretion of the court.

7. **Mr. PUCCIO** (Chile) fully agreed with the representative of Germany. Notice would anyway have to be given in accordance with the enacting State's rules. The best solution would be to delete article 18.

8. **Mr. TER** (Singapore) agreed. If article 18 was retained, there should at least be an indication that the article did not preclude a State from making rules under its own laws.

9. **Mr. SHANG Ming** (China) agreed with the representative of Thailand that there should be notice of application. The goal of the model law was to increase transparency. He could agree to the deletion of the article if it was considered unnecessary, but any reference to notice should be comprehensive.

10. **Ms. NIKANJAM** (Islamic Republic of Iran) said that all legal systems required notice under their bankruptcy laws. That should not prevent a requirement for notice in the model law, which concerned cross-border insolvency. She was against deleting article 18. Perhaps wording should be added such as: "If the laws of the enacting State require notice prior to recognition, then that State is free to provide for that".

11. **Ms. MEAR** (United Kingdom) supported the deletion of article 18. The proposed text might imply that other types of notice were precluded, or that the enacting State had no discretion as to whether or not to provide for notice in such circumstances. Taking everything into consideration, she was very much of the view that article 18 was not necessary. It would be enough to indicate, perhaps in the Guide to Enactment, that each country might wish to consider what notice requirements should be laid down.

12. **Mr. ABASCAL** (Mexico) noted that the proposed article 18 was the only article in the Model Legislative Provisions that went into procedural matters. He agreed that it would be much better to debate the article, mentioning the point in the Guide to Enactment.

13. **Mr. BERENDS** (Observer for the Netherlands) also favoured deletion of article 18, and an explanation in the Guide to Enactment.

14. **Mr. MAZZONI** (Italy) thought that either article 18 should be deleted or the concerns of the representative of Thailand should be accommodated.

15. **Ms. SABO** (Observer for Canada) said that the proposed article 18 represented an attempt to balance competing interests, those of the foreign representative and those of the debtor and local creditors. The attempt had not been successful. Article 18 could be deleted on condition that the Guide to Enactment made it clear that the enacting State would need to consider procedural requirements for notice.

16. **Mr. CARDOSO** (Brazil) agreed that article 18 should be deleted and a note included in the Guide to Enactment.

17. **Mr. NICOLAE VASILE** (Observer for Romania) said there were several possible solutions, but that he could not accept a requirement for notice prior to recognition of the foreign proceeding.

18. **Mr. CHOUKRI SBAI** (Observer for Morocco) thought that it would be best to maintain article 18 as it stood, while mentioning in the Guide to Enactment that each State had the right to adopt notice procedures in accordance with local law. Alternatively, there could be a general provision, in article 18 or elsewhere, that matters of notice were subject to the local laws of each country.

19. **Mr. MÖLLER** (Finland) agreed with the observer for Canada that, if article 18 had not achieved its objective, the best solution would be to delete it.

20. **The CHAIRMAN** said that there seemed to be a consensus to delete article 18. In the Guide to Enactment, there would be an explanation to the effect that the procedures should be left to each jurisdiction.

21. *It was so decided*.

Article 19

22. **Mr. SEKOLEC** (International Trade Law Branch) said that article 19 dealt with ways in which the decision to recognize, and its discretionary and automatic consequences, might be attenuated or adapted to the circumstances of the case, especially the interests of creditors and other interested parties including the debtor. That was done in three ways. Paragraph (1) stressed that, in exercising its discretion in granting relief under articles 15 and 17, the court must bear in mind the interests of creditors and other interested parties including

(*Mr. Sekolec, International Trade Law Branch*)

the debtor. The two versions in square brackets were in substance the same, but with a difference in emphasis, or perhaps in the burden of proof. Paragraph (2) was a reminder that, when the court granted relief under article 15 or article 17, it was free to adapt the relief or to attach conditions to it, depending on the circumstances of the case. Paragraph (3) established the principle that, after the relief had been granted under article 15 or article 17, the affected person might approach the court and request termination or modification of the relief. The text in square brackets would allow the person affected to request modification of the automatic consequences of article 16. In the Working Group, some had taken the view that the automatic consequences must not be modified by the court, but others had thought that it would be beneficial for the automatic consequences, also, to be subject to possible restriction once they entered into force.

23. **Mr. MAZZONI** (Italy) understood the reasons underlying article 19, but did not consider the wording acceptable, for many reasons. Firstly, to refer to the duty of the court to take account of the interests of the creditors and other interested persons was to state the obvious. Secondly, it should be made clear whether "creditors" meant "local creditors"; that would introduce a new concept which his delegation did not favour, but the text should be clear and the issue should be discussed. Thirdly, in general terms, it was not acceptable in some legal systems to give a court power to modify, at its discretion, principles stated in law. Discretion was only possible within the limits set out by law. If article 16 (1) was a legal provision, it could not be left to the discretion of the judge to modify the effects of that legal provision.

24. It was unacceptable, in civil law systems, for the law to establish principles and then leave the court free to adapt those principles to the circumstances of the case. It would be better to take a similar approach to that proposed by the Australian delegation, in document A/CN.9/XXX/CRP.5, for a new article 6 *bis*; one could say that nothing in the law in question limited the powers of the courts to refuse, modify or terminate relief by virtue of any other provision. That would make it clear that articles 15 and 17 did not in any way create rigidity in the system of administration of reliefs under the enacting State's law.

25. **Mr. DOYLE** (Observer for Ireland) generally supported article 19. However, there should be a specific reference to local creditors. He was also anxious that the specific reference to modifying stay or suspension under article 16 should be retained, because it was that reference which had solved his difficulties with article 16 (1).

26. **Ms. NIKANJAM** (Islamic Republic of Iran) agreed with the representative of Italy. Article 19 added nothing that was not found elsewhere in the model law. Paragraph (3) was particularly confusing; was the idea that relief granted at the request of one person could be modified at the request of another person?

27. **Mr. AGARWAL** (India) supported article 19. It made no distinction between creditors. In paragraph (3), the reference to stay or suspension under article 16 (1) should be kept. The court needed the power to remove the stay or suspension under article 16 in justified cases.

28. **Mr. KOIDE** (Japan) thought that paragraph (3) should cover not only modification or termination of relief but also recognition. There were no provisions in the model law regarding modification or termination of recognition. If, for example, the court found that the requirements under article 13 were not fulfilled, or there were public policy considerations, the court should be allowed to modify or terminate recognition. He therefore proposed that recognition should be covered in article 19 (3).

29. **Mr. BERENDS** (Observer for the Netherlands) said that it was appropriate for article 19 not to distinguish between local and foreign creditors. The aim should be equal status. In any case, what was meant by local creditors?

Multinational companies were local creditors wherever they had branches. He could accept the text as proposed. With regard to the versions in square brackets in paragraph (1), his preference was for the second alternative. In paragraph (3), he was in favour of including the reference to stay or suspension under article 16 (1), because the debtor must have the possibility of asking the court to modify the effects of article 16. The words in square brackets at the end of paragraph (3) should be included.

30. **Mr. TER** (Singapore) supported article 19, and shared the views expressed by the representative of India and the observers for Ireland and the Netherlands. He preferred the second text in square brackets in paragraph 19 (1). His main concern related to paragraph (3), as the wording in article 16 was very inflexible and it was important to have an escape route in article 19. He urged the retention in paragraph 19 (3) of the reference to paragraph 16 (1).

31. **Mr. OLIVENCIA** (Spain) agreed with the representative of Italy. The title of article 19 was inappropriate, because the whole model law was aimed at protecting the interests of creditors and others; the subject of article 19 was the possibility for the court to modify the effects of certain measures under articles 15 to 17. Regarding article 19 (3) and the reference in square brackets to stay or suspension under article 16 (1), there was an important difference between discretionary judicial measures under articles 15 and 17 and *ipso jure* consequences of recognition under article 16. It was logical that a judge might, at his discretion, amend judicial measures, but legal consequences, such as stay or suspension under article 16, could not be subject to modification by a judge in civil law systems. That did not mean that they were immutable: article 16 (2) made them subject to limitations applicable under local law. But that was sufficient; there was no need to change the system in article 19. For his country, broad judicial discretion would lead to legal uncertainty and unpredictability, contrary to the purposes of the model law. Clear legal provisions were needed. The reference in article 19 (3) to stay or suspension under article 16 (1) should therefore be deleted.

32. **Mr. CHOUKRI SBAI** (Morocco) supported what had been said by the representative of Italy. There should be a general wording requiring the court to consider the interests of all creditors, local and foreign. He welcomed paragraph (3) of article 19 because any person or entity must be able to request modification of relief granted. That would be at the discretion of the court. He also supported the inclusion of the reference to “stay or suspension”.

33. **Mr. SHANG Ming** (China) felt that article 19 could be accepted in the main. Articles 15 and 17 already offered many reliefs for foreign creditors. Article 19 restored the balance. It would not be detrimental to the interests of other creditors but would protect local creditors and other parties. In paragraph (1), the second of the alternatives in square brackets stated the principle more clearly. In paragraph (3), he agreed with those who had urged that all the material in square brackets should be retained.

34. **Mr. ABASCAL** (Mexico) agreed generally with article 19. However, paragraph (1) merely restated the fundamental principle that the interests of all parties concerned must be taken into account, a principle that was anyway applied in his country, and probably in many others, not only in insolvency cases but in all proceedings. That being so, the text could give rise to confusion. If it was retained, he would prefer the wording in the second set of square brackets.

35. Paragraph (2) would be a novelty for judges in his country, but he could accept it.

(*Mr. Abascal, Mexico*)

36. Paragraph (3) was important in his view, particularly in regard to article 16 (1). It had been said that article 16 (2) made the question of stay subject to local law. However, in his country, that might leave a gap. Under Mexican law, in the case of claims guaranteed by mortgages and similar claims, proceedings would not be stayed but execution would. In the case of disputes such as those regarding claims for damages for non-performance of contract, proceedings would be stayed and the claims would be consolidated before the insolvency judge. But in the case of arbitration proceedings, if the Model Provisions were in effect there would be a dilemma: either the proceedings would be indefinitely stayed, or the judge would take over the case from the arbitrators: neither of those solutions were acceptable.

37. One possible solution would be to take advantage of article 16 (2) to establish a special provision under domestic insolvency law whereby the stay would not affect arbitration proceedings. But that would be a very serious matter, because it implied that article 16 (2) could always be used by an enacting State to evade the effects of article 16 (1). It was for that reason that he had said, at the 613th meeting, that article 19 (3) would enable him to accept article 16. It would make it possible, when a foreign proceeding was recognized, for the stay to be ordered and then for the other party in the arbitration to ask the judge, subject to the necessary guarantees to protect creditors, to allow the proceeding to continue. That was why paragraph (3) was so important. The square brackets around the references to stay and suspension under article 16 (1) should be removed.

38. **Mr. WESTBROOK** (United States of America) said that it was not so much "local" creditors as smaller creditors that one would wish to protect. However, it was difficult to define either local or smaller creditors in a useful way. In theory, it was true that the reference to creditors in article 19 (1) was rather tautological, but he thought that it emphasized to the courts of enacting States that the interests of all creditors must be considered. In paragraph (1) , the second of the versions in square brackets seemed to be generally preferred, and was acceptable to him.

39. Secondly, it was important that modification or termination of relief pursuant to article 16 should be allowed by article 19 (3). There was, it was true, a difference between a prior court order and a legal provision being modified, but the latter seemed justified in the present case. Article 16 (1) was intended to provide quick and mandatory relief. When, in his home country, a debtor had been found to be in bankruptcy, the imposition of the kind of stay provided for would usually be proper. However, there might be unusual circumstances requiring a modification of the relief normally granted, or a change of circumstances making the relief no longer appropriate. Perhaps some wording could be found to make the sense clearer, but it would be difficult to specify all the possible circumstances that might arise, and it was important that each enacting State should feel that there was power to react to unusual or changing circumstances. The reference to article 16 should therefore be retained.

40. **Mr. WIMMER** (Germany) said that he had no problem with paragraph (1) as it stood, but would have difficulty if it gave an advantage to local creditors. The key goal was to strengthen equal treatment of creditors. Secondly, he would prefer more precise language in paragraph (3), to give the court an indication as to when relief was to be modified.

41. **Mr. TELL** (France) said that article 19 was generally acceptable. Civil law systems did give judges considerable latitude in interpreting laws, and the article seemed compatible with his country's law. On the other hand, the wording suggested by the representative of Italy did not seem satisfactory; it would give the court too much freedom.

(*Mr. Tell, France*)

42. In paragraph (1), he thought that the text in the second set of square brackets was more in line with the intended purpose. There was no need to refer to "local" creditors. He thought that the point being made in paragraph (1) was worth including, even if it might be considered self-evident.

43. Paragraph (2) was acceptable. In paragraph (3), the possibility for the local court to terminate the effects of recognition was compatible with his country's law. He agreed with the representative of Spain that a judge was bound by the law, but article 19 (3), as he understood it, merely empowered the court, if circumstances changed, to modify or terminate the measures that resulted automatically from recognition under article 16. Article 19 was important and he would like to see the bracketed phrases in paragraph (3) retained.

44. **Mr. AGARWAL** (India) said that it would not be appropriate to distinguish between international and local creditors. The proposed provision gave equal rights to all creditors. Secondly, in article 19 (1), he was in favour of the text in the second set of square brackets. Paragraph (2) was satisfactory. On paragraph (3), he supported the comments of the representatives of the United States of America and France. In changed or unusual circumstances, the court should have the power provided for in that paragraph, and the bracketed phrases should be retained. He shared the views of the representative of Mexico on the question of arbitration.

45. **Mr. MÖLLER** (Finland) said that article 19 was important, and satisfactory as it stood. In paragraph (1), he preferred the language in the second set of square brackets. He opposed any distinction between local and foreign creditors; all interests should be adequately protected. On paragraph (3), he shared the view of the representatives of the United States of America and France. The paragraph was important.

46. **Ms. UNEL** (Observer for Turkey) said that equal treatment of creditors was an important principle. She preferred the wording in the second set of square brackets in paragraph (1), but perhaps the text should refer to "all" creditors. She supported paragraph (3), because it was right that, after the automatic effects of recognition, other creditors should have the opportunity to seek modification of the measures if their interests were adversely affected. The square brackets should be removed.

47. **Mr. MAZZONI** (Italy) thought that a possibility would be to broaden the scope of article 16 (2) to make it clear that, if the law of the enacting State permitted flexibility in respect of automatic stay, that flexibility should not be prejudiced. What he was strongly opposed to was a kind of uniform imposition of judicial flexibility, or discretion, in regard to the stay. Having said that, he wished to suggest the following wording for article 19, in the light of what he had said earlier: "Nothing in this law shall limit the power of the court to refuse, modify, subject to conditions or terminate the reliefs granted under article 15 or article 17 in pursuance of or in accordance with any other law of this State".

48. **Ms. INGRAM** (Australia) said that she was surprised at the philosophical objections expressed to the general thrust of article 19. It had originally been inserted to meet the concerns of those worried about the automatic effects of article 16 and the vast range of remedies under article 17. In that regard, the model law should show the way to jurisdictions and not leave it to local law to decide whether discretion should be exercised, which would be the effect of the representative of Italy's suggestions.

49. The reference in paragraph (1) of article 19 to taking into account the interests of creditors and others provided a useful framework in which the court could operate in granting modifications to any relief granted. "Creditors" should cover both local and foreign creditors. Paragraph (3) should refer to the automatic effects arising under article 16; it should be possible to modify the effects in the case of unusual or changed

(Ms. Ingram, Australia)

circumstances. Circumstances constantly changed in cross-border insolvency. There was a need for urgent measures, but they did not have to go on in perpetuity. If examples of grounds were given in paragraph (3), care should be taken to make the list merely illustrative rather than restrictive. She also suggested that any modification of measures should be "upon the request of the foreign representative, or any person or entity affected".

50. **Mr. SANDOVAL** (Chile) said that article 19 was useful, and that the text in the second set of square brackets in paragraph (1) should be retained. In paragraph (3), he shared the concern expressed regarding the power of the judge to modify or terminate measures. Although circumstances changed, it was not logical or acceptable for a judge to have the possibility to modify measures required by law.

51. **Mr. SUTHERLAND-BROWN** (Observer for Canada) shared the view that the reference in paragraph (1) should not distinguish between creditors. He supported the text in square brackets in paragraph (3) referring to article 16 (1), for the reasons expressed. A further reason was that, under some reorganization rules, the debtor remained essentially in control of his property. For the reorganization to succeed, it was important for the debtor to be able to deal with his property in ways that might not be regarded as passing the "ordinary course of business" test.

The meeting rose at 12.30 p.m.