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Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings

Compilation of comments by Governments

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II. Comments received from Governments

A. El Salvador

In the paragraphs that follow, the Republic of El Salvador relays the comments and suggestions received from the Office of the Superintendent of the Financial System in regard to the document.

> "The Office of the Superintendent of the Financial System offers the following comments based on its analysis of the text:

1. The Office points out that, although the concepts and procedures contained in the text are of great interest for international business operations, in so far as legal enforcement is concerned only a minimal linkage exists between the Office of the Superintendent of the Financial System as the oversight body and the institutions that are subject to its oversight. Consequently, the laws governing the actions of those institutions include control mechanisms, and in some cases provide for an orderly exit from the marketplace utilizing highly specialized procedures with a view to minimizing the impact on the public.

2. In addition, it should be noted that El Salvador is currently working to develop a draft Business Recovery Act, which has three principal objectives:

- 1 – closing down non-viable companies, so that unused assets can be put to economically productive use once again;
- 2 – restoring the health of companies that are in difficulty, thereby saving many jobs;
- 3 – expanding the supply of credit.

This work is being actively pursued, and experiences are being gathered that can be used in drafting the new legislation, with a view to providing effective regulation in this area. Consequently, much of the information that has been gathered in regard to guiding principles and basic concepts will serve as reference material that can be drawn upon in preparing the draft Salvadorian legislation.

3. It is observed that the purpose of the Notes is to provide guidance for practitioners and judges on aspects of cooperation in cross-border insolvency cases (page 6).

4. The Office suggests that the scenarios presented in the different types of insolvency should be spelled out clearly and in detail.

5. In addition, in section 2 ("Terms and explanations") of part B ("Glossary") (page 8), the definition of the Spanish term "*crédito*" in subparagraph (d) – corresponding to the term "claim" in the English version of the document – should include an explanation that the Spanish term is not being used with its customary meaning: instead of referring to the active provision of financing, "*crédito*" is here being used to refer to a creditor's right to collect a debt. Because "*crédito*" is not being used with its usual Spanish meaning, a clear explanation needs to be provided.

6. With respect to insolvency proceedings, which the Notes are seeking to strengthen and support, it should be pointed out that under current Salvadorian business law there are only two procedures applicable: universal bankruptcy

proceedings and suspension of payments. For different reasons, both procedures are currently in disuse.

7. In part I ("Background"), section A ("The legislative framework for cross-border insolvency") (page 10), it would appear to be a valid assertion that, although the number of cross-border insolvency cases has increased, the adoption of legal regimes has not kept pace.

8. Complete clarity is needed in regard to the legal relationship between cross-border agreements, the Model Law and each party's domestic legislation.

9. With respect to the drafting of cross-border insolvency agreements, mention must be made of the matter of the language in which the agreement is concluded. The sample clauses state that the agreement may be drafted in English and French, but that communication between the parties is to be in only one of those languages. In our view, this is contrary to the principle of equality, and could place one of the parties – the State which is unable to draft communications in its own language – at a disadvantage (page 37).

10. The draft Notes use the construction "shall be deemed" on various occasions (page 48). This is not appropriate because the legal effect of such a presumption may be to infringe upon the procedural rights and guarantees established in the parties' primary legislation. For this reason, these passages in the Notes should be revised and made more explicit, to establish with clarity and certainty what effects derive from a given course of action, and to avoid the presumption implied by the words "shall be deemed".

11. In the Notes, there is a contradiction between the guidelines for communication between the parties in connection with insolvency, for which no major controls or restrictions are established (page 71) and the expressly and inherently recognized confidentiality of communication with respect to information relating to the debtor, such as trade secrets related to research and development information and customer information (page 76). Perhaps the proposed drafting should be revised in regard to the right to appear and be heard (page 49). Similarly, there is a need to define fully and clearly the concept of "all of the ... other parties in interest", and in that definition to indicate what authority or court will determine such legitimate interest, with a view to achieving the desired harmonization."

B. Spain

Draft suggestions and comments from the Government of Spain in relation to UNCITRAL document A/CN.9/WG.V/WP.83 (WP.83)

1. Introduction

12. Document A/CN.9/WG.V/WP.83 (WP.83) is a very important document in that it sets forth the current situation in regard to cross-border insolvency agreements with supranational effects.

13. No doubt this document will be studied closely and, like so many other UNCITRAL documents, will prove to be a seminal text as it brings together a number of key elements. Not only does it provide an overview of cross-border agreements as they have been applied in practice but it also provides an orderly

examination and comparison of the content of such agreements, it looks at the best time to conclude such agreements and it sets out a series of sample clauses that can be used in drafting them; and finally, in an annex, it provides a summary of the 32 cases that were used as a basis for assembling the document.

14. Our aim here is simply to offer a series of suggestions and comments as to form and substance (with linguistic suggestions and comments pertaining specifically to the Spanish version of the document grouped separately). We must begin, however, by once again congratulating the Secretariat on its work.

2. Suggestions and comments

2 (a) Suggestions and comments as to form

15. In paragraph 1 of the Note by the Secretariat, WP.83 makes reference to article 27 (c) of the UNCITRAL Model Law on Cross-Border Insolvency. It would perhaps be better to focus more on article 27 (d) instead, because, although it is true that coordination of the administration and supervision of the debtor's assets achieved by cross-border agreements will increase the economic return on insolvency proceedings by a significant percentage (which clearly ties in with article 27 (c)), there is also a key role for courts in these cross-border agreements (in keeping with the Secretary-General's well-founded recommendation, in his letter requesting comments, to focus on article 27 (d)).

16. Paragraph 14 lists the States that have adopted the UNCITRAL Model Law on Cross-Border Insolvency, and Spain does not appear among them. Neither is Spain included in the list at the UNCITRAL website mentioned in footnote 6. However, Spain's Insolvency Act (Law 22/2003 of 9 July 2003) contains the following statement in its preamble: "the new regulatory provisions have also drawn on the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL), recommended pursuant to United Nations General Assembly resolution 52/158 of 15 December 1997." Without going into detail about all the supranational aspects of the provisions contained in the Insolvency Act, there are nevertheless certain points worth citing here: article 227 establishes obligations in regard to international cooperation, in line with articles 25, 26 and 27 of the Model Law; article 226 on precautionary measures is similar, inter alia, to article 15, paragraph 3, and article 20 of the Model Law; and articles 229 and 230 regarding the rule of payment are largely parallel to article 32 of the Model Law. Unquestionably, Spain should be included in the list of countries that have adapted the UNCITRAL Model Law.

17. The paragraph numbering sequence in the text begins anew for each part identified by a Roman numeral. Instead, the paragraphs should be numbered continuously throughout to ensure that the document is understood as a whole and to reflect the fact that every part of the document is of interest and complements the rest.

18. In paragraph 8 of part III.A, the references to specific cases included in subparagraphs (d) and (j) would probably be better placed in footnotes (with an indication of the importance or rarity in each instance). If they are kept in the body of the text, then relevant cases will also need to be cited in the other subparagraphs.

19. Also in paragraph 8 of part III.A, subparagraph (i) is probably misplaced. Although the statement may be accurate, it perhaps does not properly fit in a list of the direct effects of cross-border agreements. Put another way, this is not one of the purposes of such agreements, but rather a consequence of the result of exploring such agreements. Cross-border agreements represent a step in developing a framework of general principles in this area, but the development of such a framework is not the result of an agreement or of several agreements; rather, it is the result of a considered examination of the agreements in question. Perhaps this reasoning would be grounds for grouping together the sample clauses contained in the document within a separate section.

20. It would perhaps be appropriate to simplify the title of the annex because the cases listed in it are mentioned not only in part III.B but also elsewhere in WP.83.

2 (b) Linguistic suggestions and comments pertaining to the Spanish version

21. In keeping with the general nature of the document, it would perhaps be better in the Spanish version for the purpose and objectives of the Notes – indicated by the nouns "*cooperación*", "*comunicación*" and "*coordinación*" – to be indicated in the title without being preceded by the definite article "*la*". It would probably also be worthwhile to revise the title so that the adjective "*transfronterizo*" modifies the noun "*insolvencia*" rather than the noun "*procedimientos*". These changes would result in the following title in Spanish: "*Notas de la CNUDMI sobre cooperación, comunicación y coordinación en procedimientos de insolvencia transfronteriza*". Thus, the title would be aligned with the statement in paragraph 1 of the Introduction, which reads, "*Las presentes Notas tienen por objeto dar orientación a los profesionales de la insolvencia y a los jueces sobre los aspectos prácticos de la cooperación y la comunicación en casos de* ***insolvencia transfronteriza***" (emphasis added).

22. In paragraph 15 of part III.A, the sentence immediately following footnote 18 is not coherent. It reads, "*El acuerdo determinará, tanto en lo sustantivo como el procesal*, ..." In Spanish this ought to read, "*El acuerdo determinará, tanto en lo sustantivo como en lo procesal*, ...", although it is possible that the passage could be recast entirely.

23. In Spanish, it would perhaps be best to refer to the Court-to-Court Guidelines using this term only, as in paragraph 51 of part III.B, for example, rather than as "*Directrices europeas*", as in the Glossary in the Introduction. In any event, only one term should be used to refer to that document.

24. References to the Concordat should also be unified. In part III.B, paragraph 76 refers to "*los principios del* Cross-Border Insolvency Concordat (*en adelante el* Concordat)", even though (what is presumably) the same document is referred to earlier in the text by other names: see, for example, footnote 41 (page 44 of the Spanish version), footnote 35 (page 42 of the Spanish version), paragraph 51 (in part III.B) and footnote 21 (page 31 of the Spanish version).

25. The first sentence of paragraph 77 is not very clear, and we would ask that the translation be revised. It may be that rendering the English word "local" as "*nacional*" will improve the Spanish version; but perhaps further adjustments are needed as well.

26. In the first sentence of sample clause (10), there appears to be an error in the verb tense in the Spanish version. The verb has to be in the future, matching the verb in the second sentence; it should not be in the conditional.

27. In paragraph 120, the second half of the last sentence seems to have no subject for the subordinate clause. The missing word could be "*trato*": if so, the text that now reads "*o pactarse que el otorgable a ciertos créditos será negociado ulteriormente en un protocolo que determine los plazos*, ..." should be adjusted to read "*o pactarse que el trato otorgable a ciertos créditos será negociado ulteriormente en un protocolo que determine los plazos*, ...".

2 (c) Suggestions and comments as to substance

28. The pragmatic nature of the entire document should be emphasized: it is the product of a large number of cases (dating back to *Maxwell* in 1992) and a series of general agreements (concordats, protocols, etc.) and other ad hoc agreements, some of them universal in scope and others dealing with narrowly defined topics. No mention of this is made at the beginning of WP.83, although paragraph 5 of the Note by the Secretariat which precedes the document does point this out. Paragraph 5 of the Note by the Secretariat should be expanded somewhat (to describe the method used to prepare the Notes) and should be inserted at the beginning of WP.83 (perhaps together with the preceding paragraphs on the history and raison d'être of WP.83). For this purpose, it could be useful to move paragraph 3 of part III, section A, to that location.

29. The first part of paragraph 122 seems to express a very important point, but its scope is substantially narrowed by the example that follows. The first part could be taken to mean, for example, that a subordinate claim may gain a higher priority and be moved to a higher category. But the example given in the second part of the paragraph makes it clear that it is a case of the agreement altering the ranking of a claim within the category of subordinate claims, but without moving that claim to a higher category. This seems possible (with the justification given in the passage from WP.83, namely, the law of another country in which a related insolvency proceeding is under way), but no more. Consequently, the first sentence should be corrected. Perhaps it would suffice to change "*Los acuerdos pueden también dilucidar ciertas cuestiones de prelación o de subordinación*" to read "*Los acuerdos pueden también dilucidar ciertas cuestiones de prelación en la subordinación*" (or, in the English version, to change "Agreements may also address issues of priority and subordination" to read "Agreements may also address issues of priority in the subordination"). Certainly, it is not appropriate to speak of agreements affecting priority in other categories of claims if there are no examples to support this.

30. In paragraph 178, example (a) perhaps says more than is intended, because everything points to the necessary consent of any new court, and even more so if that court is situated in a country which is new in so far as nationals in the pre-existing agreement are concerned.

C. Mexico

31. For purposes of cooperation and coordination procedures in cases of cross-border insolvency in Mexico, the concluding of cross-border agreements in relation to insolvency proceedings is based on two main legal texts.

32. Title XII of the Business Insolvency Act, which adopts the UNCITRAL Model Law on Cross-Border Insolvency, contains articles 304 and 305 as fundamental provisions. Those articles are transcribed below:

Chapter IV

Cooperation with foreign courts and representatives

Article 304. Cooperation with foreign courts. With respect to those matters indicated in article 278 of this law, the judge, visiting judge, conciliator or receiver shall, to the extent possible, cooperate with foreign courts and representatives in the performance of his or her duties. The judge, visiting judge, conciliator or receiver shall be empowered to engage in direct communication with foreign courts or representatives in the performance of his or her duties, without letters rogatory or other formalities being required.

Article 305. Means of international cooperation. The cooperation referred to in article 304 may be carried out by any appropriate means, and in particular the following:

(i) by naming a person or entity to act under the direction of the judge, visiting judge, conciliator or receiver;

(ii) by communicating information by any means that the judge, visiting judge, conciliator or receiver may think fit;

(iii) by coordinating the administration and supervision of the business's assets and affairs;

(iv) by having courts approve or apply agreements on the coordination of proceedings;

(v) by coordinating proceedings that are under way simultaneously with respect to a single business.

33. Article 1051 of Mexico's Commercial Code establishes as a general principle of procedural law in regard to businesses that it is preferred for the parties to reach a mutual agreement:

Article 1051. The procedure preferred above all in regard to businesses is for the parties freely to reach a mutual agreement, subject to the limitations indicated in the present volume, with the options of a conventional proceeding before the courts or an arbitration proceeding.

Should an agreement be illegal, or should an agreement which is in conformity with the law not be complied with, an incidental claim may be made in respect thereof at any time before a ruling or judgement is made in the case without the proceeding being suspended.

A conventional proceeding before the courts shall be governed by the provisions of articles 1059 and 1053; and an arbitration proceeding shall be governed by the provisions of Title IV of the present volume.

34. In addition, creditors in litigation which are party to an insolvency proceeding are required to agree to and accept the provisions of cross-border agreements, something considered difficult to achieve in a proceeding in which there are a great many creditors.