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

Compilation of comments by Governments

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I. Introduction

1. In preparation for the thirty-sixth session of Working Group V (Insolvency Law), the text of the draft Notes on cooperation, communication and coordination, was circulated at the request of Working Group V to all Governments for comment (see A/CN.9/666, para. 22). The substance of comments received as of 27 February 2009 that relate specifically to the content of the draft Notes are reproduced below

II. Compilation of comments by Governments

A. Australia

General Comments on the draft Notes

2. Overall, Australia is of the view that the draft Notes provide a valuable guide for practitioners and judges. The draft Notes are particularly useful with respect to matters that practitioners should consider when administering matters in respect of which there are concurrent administrations recognized under the Model Law. In general, the draft Notes provide excellent summaries of the relevant issues and assist judges and practitioners in following the development of the law in overseas jurisdictions.

3. Australia notes that the introduction of the Model Law and the draft Notes signals a move away from the idea of a territorially confined administration. A foreign insolvency proceeding will be recognized in the local jurisdiction if it falls within a broad definition of insolvency proceedings, if proper particulars of it are filed and if the application is made to the proper local court. Once a foreign proceeding has met the criteria, it will be recognized in the local jurisdiction and this will give the local court jurisdiction to grant relief. Cooperation and coordination between jurisdictions is encouraged and facilitated by both the Model Law and the draft Notes.

4. Australia observes that the draft Notes largely appear to assume that the relevant insolvency practitioner is a representative of the Court or at least that the Court is directly involved in insolvency administration. This reflects the legal regime operating in many countries. However, it does not reflect either Australia's corporate or personal insolvency regimes. We recognize that any document of this kind (particularly one which includes sample clauses that seek to show how general principles may be applied) will contain explanations that do not always translate well into local factual and legal contexts. Nevertheless, Australia suggests that perhaps the draft Notes could explicitly refer to the fact that in some jurisdictions the Courts have no role in the day to day administration of insolvencies. Australia also suggests that the draft Notes could indicate that some of the suggested content for agreements between Courts or agreements between insolvency representatives, may need to be varied for local conditions.

5. Australia recognizes that the appropriate approaches to be adopted in respect of the issues raised by the draft Notes are largely driven by the facts in individual cases and that the document explicitly recognizes this. The inclusion of suggested

approaches to real life examples provides valuable reference material for practitioners.

6. In so far as the draft Notes deal with coordination and communication between insolvency practitioners, Australia has no other suggestions for amendments to the text.

Detailed Comments on the draft Notes

Part 1

7. Part 1 of the draft Notes discusses the increased importance of coordination and cooperation in cross-border insolvency cases.

8. The risks of uncoordinated approaches to cross-border insolvency cases include lost value of assets. Differences between jurisdictions may also impact on the management of the debtor's assets. Australia views the draft Notes as a useful reference for practitioners advising on cross-border insolvency.

9. The enhancement of court-to-court communication processes and the goals of treating common stakeholders equitably and giving foreign stakeholders access to Australian courts on the same basis as domestic stakeholders are all seen as desirable outcomes.

10. In addition, the Australian Government welcomes the goals of:

- enhancing access to the courts;
- recognizing foreign insolvency proceedings;
- simplifying recognition procedures;
- enhancing the transparency of access procedures for foreign creditors;
- permitting courts and foreign representatives to cooperate effectively; and
- establishing rules for coordinating relief in respect of two or more insolvency proceedings.

Part II

Treatment of Claims

11. Creditors' interests operate at several levels in insolvency: questions about which creditors may vote in proceedings, how they may vote and their allocation of any distribution rely on the orderly submission, verification and admission of claims. There can be differences between jurisdictions in the role courts play. The Australian Government acknowledges this and supports agreements to address such difficulties.

Stays of Proceedings

12. Cross-border insolvencies involving multiple proceedings raise difficult questions concerning stays issued by foreign courts in foreign proceedings or stays issued in parallel proceedings in support of foreign proceedings. The Model Law provides for an automatic stay on recognition of foreign proceedings and coordination of relief between main and non-main proceedings. Cooperation is most

required in areas where potential conflict can occur. The Australian Government supports this approach.

Communication between Courts

13. Communication between courts is important to maximise the supervisory role that courts play in insolvency. Coordination between courts can reduce delays and costs and work towards the consistent treatment of similarly placed creditors. The Australian Government acknowledges this issue and supports the role of court-to-court agreements in responding to these issues. In addition, communication between insolvency representatives may be important in facilitating proceedings.

14. If it is thought desirable to make the draft Notes more concise, some of the drafting suggestions could perhaps be deleted where they highlight general drafting principles and good practice, rather than Model Law specific issues. For example, the advice that:

- "An introduction to the case, setting out the insolvency history of the case, might enhance the clarity and comprehensibility of the agreement. In many agreements, the introduction of the parties is followed by a summary of the different insolvency proceedings concerning the parties, either already commenced or imminent. Again varying degrees of detail are included, some agreements specifying the dates and places of filing, court orders made and so forth." and
- "General rules of interpretation are also often included, for example, that words importing the singular should be deemed to include the plural and vice versa; that headings are inserted for convenience only without any further meaning; that references to any party should, where relevant, be deemed to include, as appropriate, their respective successors or assigns; and that any use of the masculine gender should be deemed to include the feminine or neuter gender."

15. The draft Notes also contain lengthy "sample clauses" for cross-border insolvency agreements (e.g. the one covering pages 35 to 37), in addition to setting out, in a general way, the issues that may or should be covered by such agreements. It is queried whether such lengthy examples should be contained in a general guide to be endorsed by UNCITRAL. Such detail could be left to be expounded upon in legal and insolvency practice texts on cross-border insolvency, rather than in the draft Notes.

Conclusion

16. Enhancing access and recognition of foreign proceedings is a necessary step in ensuring equal treatment between foreign and domestic debtors and creditors. While Australian personal and corporate insolvency law imposes obligations on Australian courts to cooperate with the courts of a range of prescribed countries, the implementation of the Model Law assisted by the draft Notes will provide greater opportunities to extend these processes to other countries.

17. Australia welcomes the draft Notes and generally finds them to be a valuable resource for practitioners confronted with cross-border insolvency issues.

B. Canada

18. WP.83 is a solid, comprehensive and useful document in understanding how different jurisdictions deal with cooperation, communication and coordination in cross-border insolvency proceedings. It should be kept separate from the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, because it has a broader utility in the insolvency context, as a valuable reference document, and is not limited to enterprise groups. It should be noted that it is important to remain flexible in the approach to the protocols, and their content but also to be aware of issues that could affect their neutrality.

C. Czech Republic

19. We discovered from received responses that most of our domestic courts and judges did not have any experiences in this matter. The majority agreed on lack of on-line trade and insolvency registers in particular EU Member States.

20. Drawing upon their practical experience, they were not acquainted with facilitating cross-border agreements. Nevertheless, they've supported the idea of the use of cross-border agreements to promote the efficient coordination of multiple proceedings against the debtor and to help to clarify the expectations of parties.

21. Beside that, …, we do not have any fundamental comments on the draft UNCITRAL Notes.

D. Federal Republic of Germany

22. …[W]hile thanking the Secretariat for making available the draft Notes on Cross-Border Insolvency Proceedings to member States, the Federal Republic of Germany has no additional comments on the draft Notes.

E. Indonesia

I. General Comments

23. The problem of cross-border insolvency occurs when a multinational company is declared insolvent in a country while the company has subsidiary(/ies) in another country, established under local law. Normally countries have provisions in their laws that Insolvency rulings taken by a court under its jurisdiction would be applicable to all assets owned by the debtor, including assets in other countries. A problem may occur if a country applies the principle of universality with regard to an insolvency decree made by its court, but reject the implementation in its country of insolvency decrees made by foreign courts. There will also be a problem if a country only limits the applicability of an insolvency decree by its court only to assets in its territory, as this results in the creditor not being able to obtain all of the assets of the debtor.

24. The Indonesian Law on Insolvency (Law No. 37 of 2004 on Insolvency and the Postponement of Debt Payment Obligation) does not specifically address cross-border insolvency. However, Article 212 of the Law stipulates that a concurrent

creditor, who – after being declared insolvent – used his assets abroad to pay his debts, is obliged to reimburse the amount that he took from his insolvent assets. This implicitly means that Indonesian Insolvency rulings applies to foreign jurisdictions even though in a very limited context.

25. With regard to an insolvency decision by a foreign court which is to be executed in another country where the debtor's assets are located, most countries do not allow their courts to execute the rulings of foreign courts based on the sovereignty principle. This also applies in Indonesia, in line with Indonesian private law, whereby the rulings of foreign courts cannot be acknowledged and carried out in Indonesia.

26. To sidestep this condition, some efforts to harmonize laws in cross-border insolvency have been undertaken, so that a country can acknowledge and implement the insolvency rulings of foreign courts. These include the formulation of the UNCITRAL Model Law on Cross-Border Insolvency as well as multilateral and bilateral treaties, which allows cooperation in implementing rulings on insolvency.

27. The draft UNCITRAL Notes is one of the means to facilitate coordination and cooperation in implementing rulings of insolvency by providing practical guidelines for practitioners of insolvency processes, particularly with regard to cross-border insolvency.

II. UNCITRAL Model Law on cross-border Insolvency

28. The Indonesian Law on Insolvency has not adopted the provisions in the UNCITRAL Model Law on Cross-Border Insolvency; in fact, it contains no provision on the issue of cross-border insolvency. The Indonesian court itself lacks experience in handling cross-border insolvency.

29. In order to enable direct contact between courts in dealing with cross-border insolvency cases, a national legal framework is needed as the basis for local courts to provide assistance to foreign courts. Normally, in the context of mutual legal assistance between countries, a court can provide assistance through diplomatic channels or through a central authority specifically tasked with facilitating international mutual legal assistance.

III. Cross-Border Agreement

30. A cross-border agreement is an agreement between or among parties involved in a cross-border insolvency case aimed at cooperating or coordinating in the insolvency process in different countries on one particular debtor. Considering that this agreement is made by individuals involved in the management of the insolvent assets and not by the States, it is questionable whether the agreement binds the State or its institutions which will be involved in the insolvency process. Such an agreement is simply a contract which binds the parties and gives no obligations to State institutions.

31. Cross-border agreements would become binding to the State only if there is an umbrella international treaty, be it bilateral or multilateral, which specifically provides for the acknowledgement and implementation of insolvency decrees by foreign courts. Therefore, in promoting the cross-border insolvency process, it is not

sufficient to have only a cross-border agreement but it also has to be supported by international treaties.

F. Latvia

32. The Ministry of Justice has considered the Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings A/CN.9/WG.V/WP.83 (hereinafter – Draft document) and would like to express the following opinion. The Draft document has been developed as a legislative guide in cross-border insolvency – as addition to the UNCITRAL Model Law on Cross-Border Insolvency (1997) (hereinafter – Model Law). The Draft document comprises both practical examples of insolvency cases and excerpts of other regulations, for instance, Council Regulation No. 1346/2000 on insolvency proceedings (hereinafter – Regulation 1346/2000). The document covers rather detailed description of possible cooperation on cross-border insolvency issues among administrators, courts etc.

33. One of the aims of the Draft document is to facilitate the adoption of the Model Law in Member States. The text of the Model Law has been worked out with a purpose to make it possible to transpose it directly in the national regulation or to adopt only general principles of the Model Law. The Regulation 1346/2000 is applicable in the territory of the European Union, consequently, also in Latvia. Such relations with regard to third countries are not regulated.

34. Within the 35th Session of UNCITRAL Working Group V there were wide debates on the form of the mentioned Draft document. Member States unitedly stressed that the mentioned document must not fully or in some cases, partly replace the Model Law; the Draft document is developed as the auxiliary material the objective of which is to give insight into possible types of cooperation and not to indicate preferable action.

35. After evaluating the Draft document the Ministry of Justice comes to the consideration that the Draft document is relatively complete and comprises good practical examples. It equally treats all creditors, providing that a creditor who has received dividends on his/her own claim during the insolvency proceedings can act in the allocation of assets in other proceedings unless creditors of a similar class or category in these other proceedings have received dividends of equal value. Article 16 of the Draft document covers the reference to Articles 28 to 32 of the Model Law, including Article 32 on expenses in concurrent proceedings. According to the above-mentioned article if a creditor's claim in the insolvency proceedings taking place in one foreign State is partly realized, a creditor's claim in the second proceedings can be realized only after other creditors' claims of corresponding status. Concerning this issue the Preamble of Regulations 1346/2000 states that in order to ensure equal treatment of creditors, the allocation of assets have to be coordinated, and every creditor should be able to keep what s/he has received in the course of insolvency proceedings and should be entitled to participate in the allocation of total assets in other proceedings only if creditors with the same status have obtained the same proportion of their claims. A creditor who, after initiating the proceedings mentioned in Article 3, Paragraph 1, receives a complete or partial fulfilment, exercising any instruments (including compulsory), of his/her claim from

assets that belong to a debtor and that are situated in another Member State, has to send the received dividends back to the liquidator according to Articles 5 and 7.

36. Article 47 of the Draft document states that the contract of cooperation has to contain reference about the language of cooperation. Simultaneously it is indicated that the present practice is to compose agreements and develop cooperation in English as default language, however, it does not mean that the language cannot be different. The issue of language might be topical in cases when a debtor has become insolvent in one State but his/her assets are allocated in more than one State or debtor's creditors are not from another State than a State where the insolvency proceedings are initiated. In such case one State concludes a contract (as a voluntary agreement) with involved countries, in which it can be stipulated where the primary proceedings have to be realized, differences in jurisdiction of involved countries and other issues ensuring that the insolvency proceedings are equal and just for all States involved.

37. Article 181 of the Draft document on expenses of insolvency proceedings corresponds to the Insolvency Law of the Republic of Latvia where is stated that expenses of the insolvency proceedings have to be paid off by the debtor.

G. Norway

38. First, we appreciate and are very grateful for the work laid down by the Secretariat in the development of reports and discussion papers, including the draft Notes. The draft Notes have been brought to the attention of insolvency practitioners, and the Norwegian Ministry of Justice has received some comments to the draft Notes and to cross-border issues in general.

39. Second, Norwegian law currently lacks a good and comprehensive legal framework with regard to cross-border insolvency. There is a need to develop Norwegian cross-border insolvency law; both due to a substantial increase in foreign trade and since some cases have demonstrated the limitations in Norwegian cross-border insolvency law. Norway is party to the Nordic Bankruptcy Convention 1933. However, there is a need to look into and develop cross-border cases involving other States than the Nordic States. The Ministry of Justice is currently elaborating on these issues. Both the UNCITRAL Model Law and the EU Regulation 1346/2000 will be part of the elaborations.

40. On this background, it is difficult to evaluate cross-border agreements' current impact in Norwegian insolvency law. At the same time we find that the draft Notes may be very useful, since it provides an overview of different situations that may be of interest in the development of a Norwegian cross-border insolvency law. The discussions and the examples under chapter II and chapter III may prove useful as part of the preparatory works.

41. We recall that during the meetings held in Vienna from 17 to 21 November 2008 there were some discussions regarding the status of the Notes (when finalized). In our view, the Notes should serve mainly as an overview of examples and different approaches to the contact and cooperation between the parties to a cross-border insolvency proceeding.

H. Singapore

42. We have considered the draft Notes and we have no comments at this juncture. We will however be consulting with other Government agencies as well as the Judiciary in due course to study the various issues raised in greater depth.

I. Switzerland

43. We suggest adding the "Swissair" case to the cases cited in the Annex. The Swissair case was one of the most important insolvency cases in Switzerland in the last decades and has substantial international implications.[1] It was – as far as we know – one of the first procedures in Switzerland to apply a cross-border agreement between courts/insolvency representatives. We therefore suggest the following wording to be added to the annex of A/CN.9/WG.V/WP.83:

> Swissair Schweizerische Luftverkehr AG (2001)
>
> "Footnote: Insolvency proceedings before the district courts of Bülach (Swissair and other members of SAirGroup) and Zurich (SAirGroup).
>
> Insolvency proceedings were opened in Switzerland over several companies of the Swissair Group. In order to protect the assets of the respective companies abroad ancillary proceedings were initiated in several countries (preliminary injunction order by a US judge under section 304 of title 11 of US Bankruptcy Code; temporary stay order by a Canadian judge under section 18.6 of the Canadian Companies Creditors Arrangement ACT; ancillary proceedings in France and Israel, ancillary winding up of the English Swissair branch). To facilitate the coordination between the Swiss and English office holders a Protocol was agreed. It dealt with the realisation of assets, the payment of liabilities, costs and expenses, reporting obligations as well as the receipt and adjudication of creditor claims. It was designed to avoid duplication of work while at the same time protecting creditor rights and respecting priority rights."[2]

44. In addition, we suggest that the following references to the Swissair case are added in the main text:

- In Footnote 20: In the Swissair case, the protocol had to be confirmed by the English courts, but not by the Swiss courts;
- In Footnote 28: insert Swissair;
- In page 58 ad lit. d) after "allocation of responsibility between the different parties in interest" insert a Footnote with a reference to Swissair;
- In Footnote 161 a reference to Swissair;
- In Footnote 180 a reference to Swissair.

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[1] See the liquidator's homepage under www.liquidator-swissair.ch.

[2] The Swiss delegation thanks Ms Brigitte Umbach of Wenger Plattner Attorneys, Zurich for her valuable contribution to these comments.

45. We avail ourselves of the opportunity to congratulate the drafters of A/CN.9/WG.V/WP.83 for the excellent quality of the document. We are convinced that this document will be of great use for legislators and practitioners worldwide.