



General Assembly

Distr.: General
19 April 2010

Original: English

**United Nations Commission
on International Trade Law**
Forty-third session
New York, 21 June-9 July 2010

UNCITRAL Legislative Guide on insolvency law: draft part three on the treatment of enterprise groups in insolvency

Compilation of comments by Governments*

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* It should be noted that these comments have been prepared on the basis of documents A/CN.9/WG.V/WP.90 and addenda. The numbering of the recommendations in A/CN.9/WG.V/WP.90 differs slightly from the numbering of recommendations in the subsequent document A/CN.9/WG.V/WP.92 as follows: recommendations 226-239 in the earlier document are numbered 225-238 in the revised version.



I. Introduction

1. In preparation for the forty-third session of the Commission (New York, 21 June-9 July 2010), the text of the draft of part three on the treatment of enterprise groups in insolvency as contained in documents A/CN.9/WG.V/WP.90 and Add.1, was circulated at the request of Working Group V to all Governments for comment (see A/CN.9/WG.V/686, para. 125). The substance of comments received as of 12 April 2010 that relate specifically to the content of draft part three are reproduced below and in the subsequent addenda.

II. Comments received from Governments

A. Czech Republic

2. Firstly, we would like to present our great appreciation on well-done and very comprehensive work made by Secretariat in this matter. Secondly, we have consulted the respective documents to the experts and judges who are concerned with practical aspects of insolvency proceedings. Moreover, we discovered from received responses that we have not had any experiences in this matter. Please note that we do not have any fundamental comments to the part III of the Legislative Guide on Insolvency.

B. Poland

3. The Third Part of the Legislative Guide touches upon an issue, which is extremely important nowadays, i.e. insolvency of two or more enterprises, which are connected with each other. This problem has not been regulated so far neither in Polish law nor in majority of laws of the UN members. This is an issue different from the so-called cross-border insolvency, which concerns the cross-border consequences of insolvency of a single legal entity. This problem is dealt with by the UN model law, which influenced second part of the Polish act — The Law on Insolvency and Restructuring of 2003. On the European level the cross-border insolvency is regulated by Council Regulation 1346/2000 of 29 May 2000 on insolvency proceedings. This Regulation, however, does not deal to any extent with the insolvency of the groups of enterprises which was criticized in the European literature.

4. So far no examples existed that could inspire domestic legislations in the process of creating rules dealing with the situation when several formally separate legal entities become insolvent, however there are bonds between them that allow for treating them as one economic organism. Such situation takes place in particular in relation to holding structures. It took place recently also in Poland. I am aware of a situation when five or six Polish companies with German stakeholders announced insolvency, which was indirectly caused by the insolvency of the mother company. It further caused insolvency of companies operating also in Italy and Germany.

5. The Third Part of the Legislative Guide on Insolvency Law deals with this problem and aims at providing standard solutions, which could and should be introduced into the national legislations. Certainly, the act under scrutiny does not

have any binding force, and the Member States are not obliged to accept it. Moreover, it describes the methods of solving particular problems, which could be incorporated into national legislations. Taking this fact into account, this study is definitely different from a model law. It is, however, possible that based on the Legislative Guide a model law will be created, but it is not decided yet at this stage of the work.

6. The Third Part of the Legislative Guide treats separately insolvency of enterprises groups on the national level (when entities originating from one State become insolvent) and on the international level (when insolvency refers to entities originating from different States). Both spheres are strictly connected and it is desirable to maintain the coherency of both of the regulations in the case of their introduction into the national legal systems.

7. It is worth to underline that the Guide does not, under any circumstances, assume abolishing of the so-called corporate barrier, and so the legal separation of each of the insolvent entities is respected. The Guide does not allow also for merging the insolvency proceedings in the strict sense, which could prove to be too complicated, but mentions consolidation of the proceedings. It refers to different methods of cooperation between the insolvency representatives and the insolvency courts. A particular attention is paid for example to issues like: cooperation of courts, cooperation of insolvency representatives, cooperation agreements, agreeing on the reorganization plans concluded in particular proceedings, costs of the proceedings, coordination of liquidation of the insolvency estate, coordination of interrogation of individuals, ordination through establishing common insolvency representative in several insolvency proceedings, taking part also abroad. All proposed solutions fully respect provisions of national legislations.

8. The proposed solutions, which are inevitably general, do not give rise to controversies and could be introduced also into the system of Polish law. It should be underlined that this project aimed at creating solutions, which would be possible to apply in countries with different legal regulations and legal traditions (Europe, America, Asia, Africa, etc.). It was possible due to the fact that representatives of different legal traditions participated actively in the work of the Working Group.

9. Taking into account the unquestioned necessity of commencing (also in Poland) legislative works on the insolvency of enterprises groups (on the national and international level) it could be suggested that the work on this subject in UNCITRAL should lead to preparation of a model law. Establishing model law, which would include solutions contained in the Third Part of the Legislative Guide on Enterprises Groups. Insolvency would create wider possibilities of enacting laws in particular States, which would be in proximity with regulations introduced in other States, which constitutes the necessary condition for harmonization on the international level.