United Nations A/CN.9/733/Add.1

General Assembly

Distr.: General
17 May 2011
English
Original: Spanish

United Nations Commission on International Trade Law
Forty-fourth session
Vienna, 27 June-8 July 2011

Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency

Compilation of comments by Governments (*continued*)*

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* Submission of this document was delayed due to the late receipt of comments.

V.11-83053 (E) 300511 310511

Annex

Comments received from Governments on the judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency

Argentina

[received: 17 May 2011]
[Original: Spanish]

With regard to the analysis of the judicial materials, we support the application of the law of the State in which the insolvency proceedings began (lex fori) in determining the authorization of the foreign representative to act as a representative of a debtor's liquidation or reorganization.

The "recognition" principle, based on procedural economy as is customary in such cases, is aimed at avoiding lengthy and time-consuming processes by providing prompt resolution of an application for recognition. It is therefore reasonable for the court not to consider whether the foreign proceeding was correctly commenced under applicable law, since in the area of international legal cooperation it is not the applicable law as such that is under scrutiny. Rather the question at issue is that the recognition of a foreign proceeding may be denied only if it is manifestly contrary to the international public policy of the State in which the receiving court is situated, which is a material, substantive, fundamental requirement. It should be stressed that we support a concept of international public policy based on fundamental principles of the prescriptive legislation governing international cases, which is not the same as the peremptory norms of domestic law, nor reducible to constitutional safeguards, although the concept does include them. The material under consideration is in the spirit of broad cooperation (indeed, cooperation and coordination are two key elements of the Model Law in question) and therefore the international public policy exception invoked by the enacting State should be interpreted restrictively and invoked only under exceptional circumstances.

Another positive aspect is that the foreign representative must inform the receiving court of any other foreign proceeding regarding the same debtor of which he or she becomes aware, bearing in mind the above-mentioned principle of procedural economy, which includes taking into consideration possible procedural obstacles such as international *lis alibi pendens*, especially in the area of insolvency as a universal process.

We welcome the definition of the "establishment" of a debtor (always a difficult concept to define, as shown, for example, by article 6 of the draft Code of Private International Law of Argentina, No. 2016-D-04) as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services, the aim being to indicate whether the proceeding at issue is a non-main proceeding. Likewise, on the basis of the EC Regulation (European Council (EC) Regulation No. 1346/2000 on insolvency proceedings), aimed, it should be noted, at allowing a determination of jurisdiction rather than cooperation, it is logical to define the main proceeding as that which is followed in a State where

the debtor has the centre of its main interests, which, in the case of a physical person, equates to the person's habitual residence, in the absence of proof to the contrary.

It seems entirely appropriate that there should be no conditions of reciprocity. Let us recall that the Argentine Insolvency and Bankruptcy Act No. 24522 stipulates reciprocity under article 4, which has drawn criticism. We would note the vote and brilliant justification of Dr. Aída Kemelmajer de Carlucci in the Sabate Sas S.A. case, in ruling No. 20541/42086 Sabate Sas S.A., and in ruling No. 41030 Covisan S.A. — bankruptcy proceedings, late bankruptcy petition, no incident recorded, remedy of cassation (Supreme Court of Mendoza, Sala I, 28 April 2005 — Sabate Sas S.A. in: Covisan S.A. bankruptcy proceedings, late bankruptcy petition (La Ley, ed. 214-372, 29 July 2005). Please see María Elsa Uzal, *Apostillas sobre la reciprocidad en el artículo 4 de la ley de concursos, las transferencias de fondos y la prueba del derecho extranjero [Apostille conventions on reciprocity in article 4 of the Bankruptcy (Insolvency), Transfers of Funds and Evidence under Foreign Law Act]* (La Ley, 8 July 2005); Gabriela Salort de Ochansky, *El criterio de la reciprocidad, la carga de su prueba y las facultades judiciales [The criterion of reciprocity, the onus of proof and judicial powers]* (La Ley, 29 July 2005); Alfredo Mario Soto, *Una sentencia en homenaje a los 70 años del uso jurídico [A judicial opinion in tribute to 70 years of legal usage]* (El derecho, ed. 214-383, 2005)), where it is shown that this principle has its origins in the theory of *comitas gentium* or the comity of nations, dating back to the doctrine of the Dutch and Flemish Schools of the seventeenth and eighteenth centuries (Werner Goldschmidt, *Derecho Privado Internacional*, p. 72, 9th Edition, Buenos Aires, Lexis Nexis Desalma, 2002). At issue is an application of the right to retortion, which, according to much of the doctrine, is viewed as inappropriate.

With regard to the formal requirements of cooperation, the judicial material establishes that documents shall be presumed to be authentic, whether or not they are legalized, which would appear to be in keeping with the integration and globalization of our times.

As to the possibility that the receiving court take account of abuse of its processes, including improper forum shopping, the material suggests recourse to public policy as grounds to decline recognition. However, rather than a public policy exception, the situation here, we feel, is more akin to fraud and abuse, which constitute hindrances or limits based on manipulation of the facts, with the aim of ensuring the application of a law and thus getting round the original intention of the provision (See Alfredo Mario Soto, *Temas estructurales del derecho internacional privado [Structural themes in private international law]*, Buenos Aires, Estudio, 2009).

Under the Model Law, the courts are entitled to communicate directly with the foreign courts or foreign representatives (by such means as fax, e-mail, video or telephone), without the need for requests or letters rogatory. It would be desirable to examine such a possibility within Argentine positive law, taking into account the need to have at our disposal the means to ensure more efficient cooperation with a view to effective recognition while at the same time safeguarding the interests of the parties.

To summarize, based on what has been established above, we believe that the judicial material is an important element in the possible incorporation and subsequent application of the UNCITRAL Model Law on Cross-Border Insolvency in Argentina.