United Nations A/CN.9/WG.V/WP.148

General Assembly

Distr.: Limited
29 March 2017

Original: English/French

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Fifty-first session
New York, 10-19 May 2017

Comments submitted by Canada on Draft model law on recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.143)

Note by the Secretariat

The Government of Canada has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following observations in order to provide the Working Group with additional information for its deliberations. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

V.17-01907 (E)

Annex

Introduction

This document contains comments and suggested language in relation to the recognition and enforcement of insolvency-related judgments. Part A describes the guiding principles applicable to the elaboration of model provisions to cover the recognition and enforcement of foreign judgments in the context of insolvency law. Part B contains suggested wording for the Draft Model Law on the Recognition and Enforcement of Insolvency-related Judgments. Each drafting suggestion is followed by a comment explaining the rationale for the suggested change. Part C contains suggested language for a change to the Model Law on Cross-border Insolvency.

In this text, "this Law" means the Draft Model Law on the Recognition and Enforcement of Insolvency-related Judgments.

A. Guiding Principles

Scope of application — Provisional relief

It is expedient that the scope of application of the Draft Model Law on the Recognition and Enforcement of Insolvency-related Judgments covers protective measures, including stays of proceedings, freezing orders and other orders or decrees intended to preserve the value of the estate of the insolvent debtor. When insolvency is imminent, money can flow easily and assets can be dispersed rapidly. The value added of an instrument dealing with the recognition and enforcement of insolvency judgments is precisely to preserve the value of the business in financial distress, to enable a restructuring, thereby avoiding destruction of wealth, to protect creditors' and debtors' rights and to maintain jobs.

Indeed, the value added of the proposed instrument does not rest with the recognition and enforcement of an order confirming a restructuring plan or of a liquidation judgment. When these orders are rendered, creditors usually know what they will be able to obtain given the outcome of the insolvency proceeding and those orders are very seldom the subject of enforcement procedures. Where a restructuring takes place, creditors, the insolvent entity and stakeholders often have entered into agreements with binding effects. The order confirming the restructuring is only an additional element to existing binding obligations.

For these reasons, the scope of the proposed instrument should not be restricted to decisions on the merit or final judgments. Such a limited scope would not allow the recognition and enforcement of a number of interim protective measures essential for the effective resolution of the insolvency. Instead, the scope of the proposed instrument should be responsive to evolving situations insolvency courts commonly face, such as risks that assets be dispersed, the need for stays of proceedings against the insolvent debtor or the need for the orderly treatment of claims.

Simplicity and clarity

We are grateful to the UNCITRAL Secretariat for having drafted provisions that are clear, concise and simple. It will ensure they are applied in a consistent manner in the various jurisdictions choosing to adopt them. Simplicity also reflects the fact that model provisions are designed to be adapted to the various legal systems of both developed and developing countries and common law and civil law jurisdictions. We urge delegations to support choices and provisions that are simple and clear, because they lead to less litigation and better judicial cooperation.

For that reason, the provisions dealing with the preservation of assets in the period where enforcement of the foreign judgment is sought are concise (see new Article 4.3 below). The drafting promotes simplicity and clarity by being consistent with other UNCITRAL instruments. Similarly, insolvency-related judgments on

directors' liability in the period leading to insolvency have been excluded from the scope of the instrument. Drawing the line between situations where an insolvency-related duty is involved versus those where there is no such duty can be challenging. For that reason, the deliberate choice of excluding from the scope of application of the model provisions judgments on directors' liability has been made in order to promote simplicity, clarity and consistent applications.

Promoting harmonization of laws

UNCITRAL seeks to facilitate international trade and business through the modernization and harmonization of rules on international commercial law. Harmonized rules lead to a more stable and predictable environment for commercial enterprises. In the case of insolvency law, they also facilitates judicial cooperation and coordination by ensuring the fair and predictable treatment of creditors' rights, by making similar remedies available in the various insolvency courts, and by enabling the mutual recognition of insolvency decisions. Harmonized rules contribute to a functional system of cross-border cooperation and coordination, because the various courts involved in the insolvency of a given economic entity do not issue inconsistent decisions.

For that reason, it is only with great caution that recommendations for the adoption of alternative options for a given provision should be made. In particular, definitions which set the basic requirements for the application of various provisions in a model law should, to the greatest extent possible, not include alternative language or options. The proposal to include variants in relation to the definition of insolvency-related judgment is a major concern in that respect.

The Benefits of increased cooperation

The Model Law on Cross-border Insolvency has been a success. It has been adopted by some 40 states and is operating well in those jurisdictions. Experience has shown that judicial cooperation can significantly contribute to the positive resolution of difficulties that arise in cross-border insolvency proceedings. Although not common at the inception of the Model Law, the form of judicial cooperation encouraged by the Model Law is now recognized and promoted in a large number of jurisdictions.

From a Canadian perspective, judicial cooperation, through the use of cross-border insolvency agreements or protocols setting the parameters to assist in the management of cross-border proceedings and the harmonization of procedural issues, has been very effective and these tools play an important role in the promotion of judicial cooperation to the benefit of creditors and stakeholders. Experience shows that there is mutual benefit to cross-border cooperation and coordination of insolvency proceedings.

B. Drafting Suggestions and Justifications

New Article [2] Definitions

"Foreign main proceeding" means a foreign main proceeding as defined in [*insert reference to provisions implementing the Model Law on Cross-border Insolvency*];

For jurisdictions not having implemented the Model Law on Cross-border Insolvency, but still wishing to exclude decisions rendered from non-COMI jurisdictions, the following definition can be included: **"Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;**

Comment

This definition is needed because of the reference to foreign main proceeding in the definition of "insolvency-related judgment" proposed in this text.

"Insolvency-related judgment" means a judgment issued by a court supervising a foreign proceeding and which is issued on or after the commencement of that proceeding, but does not include:

a) a judgment relating to directors' liability;

[b) a judgment covering transfers at under value in the period prior to insolvency;]

c) a judgment recognizing contract-based remedies exercised by creditors in the period prior to insolvency; or

d) a judgment rendered by a court that is not a foreign main proceeding, except if the judgment is issued by a court acting as a planning proceeding[1];

[and]

[e) a judgment from a jurisdiction that does not recognize insolvency-related judgments issued by a court in this State.]

Comment

Chapeau

To fall within the scope of this Law, a judgment must be issued by a court supervising a foreign insolvency proceeding. As is the case under the Model Law on Cross-border Insolvency, the proceeding needs to possess certain attributes. These include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding.[2]

Within those parameters, a variety of collective proceedings would be eligible to qualify as a foreign proceeding, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. It also includes those in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, "debtor in possession").[3]

Subparagraph a)

Judgments dealing with directors' liability are excluded from the definition of insolvency-related judgment as some of these judgments are decided on the basis of corporate law (as well as other laws) and it would be difficult to distinguish between "true" insolvency-related judgments and the others (subparagraph a)).

Subparagraph b)

Undervalued transactions are subject to varying standards under insolvency laws depending on the jurisdiction. For example, as illustrated in the Legislative Guide on Insolvency Law, Part II, some jurisdictions might use deeming provisions whereby, a transaction is deemed to be undervalued if below a certain threshold, they might require specific modes to determine the value of the transaction which are not known in other jurisdictions, or they might offer defences that are unknown in other jurisdictions (see paragraphs 175-176). In the domestic context, those transfers are subject to local rules, but one could argue that defendants who relied on legal standards known to them should not be found liable for transactions at

[1] This definition of "planning proceeding" based on the draft Model Law on Corporate Groups is added to this draft.

[2] Paragraph 66, Guide to Enactment to the Model Law on Cross-border Insolvency.

[3] Paragraph 71, Guide to Enactment to the Model Law on Cross-border Insolvency.

undervalue determined against standards of another jurisdiction. For that reason, transactions at undervalue entered into in the period prior to the insolvency are excluded from the definition (subparagraph b)). Note that it is suggested that judgments covering transactions at undervalue entered into after the commencement of the insolvency proceeding be covered. The commencement of an insolvency proceeding constitutes sufficient notice that transactions could be reviewed and that the insolvency laws of the jurisdiction of the insolvent entity will apply. Avoidance transactions, or transactions intended to defeat, hinder or delay creditors, would remained covered by the definition of insolvency-related judgment. These transactions differ from transactions at undervalue because they show an intention to deceive.

Subparagraph c)

As a general rule, claims based on general contract law, whether determined by an insolvency court or a court of general civil jurisdiction, should not be covered by the definition. Contractual remedies are grounded in the contract to which they relate and, by their nature, can be exercised without the assistance of a court. Contractual remedies covered by this exclusion encompass title reservation agreements, *ipso facto* clauses, set-offs and other forms of legal compensation. The exclusion aims only at contractual remedies exercised in the period prior to the insolvency. This distinction is justified because contract-based remedies exercised under the supervision of the insolvency court are considered to be insolvency judgments.

Subparagraph d)

By incorporating references to concepts found in the Model Law on Cross-border Insolvency, the definition clarifies the relationship between this Law and the Model Law on Cross-border Insolvency. It means that a judgment from a foreign main proceeding, as defined under the Model Law, can be recognized and enforced in the receiving jurisdiction by application of this Law, both in situations where the receiving jurisdiction is a non-main proceeding or has not open insolvency proceeding in relation to the insolvent debtor (subparagraph d)). The recognition and enforcement of judgments offered under this Law do not prevent the application of relief available under the Model Law on Cross-border Insolvency should those seeking enforcement prefer to follow that approach (The relationship between this Law and the Model Law is also discussed in Part C).

By including judgments from planning proceedings (through the exception to the exclusion for subparagraph d)), the definition recognizes that, in some situations, a planning court may be issuing a judgment in relation to a corporate group member which does not have its center of main interest in the jurisdiction of the planning court. Covering insolvency-related judgments of planning courts enables a better coordination of planning proceedings in a manner that is consistent with the draft Model Law on Enterprise Groups.

Establishing as a principle that only insolvency-related judgments from a foreign main or a planning proceeding fall under the scope of this Law prevents the application of chain recognition of judgments. As such, a judgment issued in state A, subsequently recognized in state B, could only be recognized in state C on the basis of the original judgment in state A, not of the judgment from state B.

Subparagraph e)

[Subparagraph e) provides a mechanism whereby only a judgment from a reciprocating jurisdiction may be recognized and enforced under this Law. A reciprocating jurisdiction is a place (other than the enacting jurisdiction) that has enacted similar legislation on the recognition and enforcement of insolvency-related judgments. The reciprocating jurisdiction may be limiting the application of its similar legislation to reciprocating jurisdictions or not. Although that provision is

not necessary in order to have a functioning law and, therefore, not recommended for adoption, enacting jurisdictions might be concerned about extending the benefit of this Law to jurisdictions that do not cooperate in the same manner. This provision recognizes that, from a policy perspective, some jurisdictions will wish to limit the application of their Law.]

Examples — Guide to Enactment

The illustrative list in [Alternative A] should be found in the Guide to Enactment. It does not add any additional legal foundation for a judgment to qualify as an insolvency judgment. However, it provides useful illustrations of the situations that are intended to be covered.

"Planning proceeding" means a foreign planning proceeding as defined in [*insert the reference to the provisions implementing the draft Model Law on Enterprise Groups*];

For jurisdictions that have not adopted a group solution, but still wish to recognize and enforce decisions from a planning proceeding: **"Planning proceeding" means a main proceeding commenced in respect of an enterprise group member that is a necessary and integral part of a group insolvency solution, in which one or more additional group members are participating for the purpose of developing [and implementing] a group insolvency solution and in which a group representative has been appointed;**

Comment

This definition is necessary because of the reference to planning proceeding in the definition of insolvency-related judgment.

The other definitions in the draft remain unchanged.

New Article [4] Interest to bring an application

A foreign representative, or a group representative in a planning proceeding, appointed in the court where the judgment was issued, a judgment debtor or any creditors whose interest is affected by the judgment [or other persons entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment] may bring an application for recognition of that judgment.

Comment

This provision is based on existing Article [10(1)]. The conditions that need to be met in order to have standing under this Law are brought upfront in the legislation. The proposed drafting also resolves an issue under Article [10] which is the linkage between the foreign representative or the group representative in a planning proceeding, on the one hand, and the court having issued the judgment for which recognition is sought, on the other hand. It would be inappropriate to grant standing to any foreign representative, such as foreign representatives in unrelated-insolvency proceedings, to seek recognition and enforcement of a judgment. In practice, it means that, in a group proceeding, a foreign representative of a group member who sought and obtained a judgment in the planning court would not necessarily be in a position to seek recognition and enforcement of the resulting insolvency-related judgment in a third state. The resulting judgment would have to be recognized and enforced upon application by the group representative, the judgment debtor or creditors affected by the judgment.

The current text of Article [10(1)] referring to other persons entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment has been maintained. It is understood, however, that applicants will prefer to fall in the other categories of persons listed in the provision if

possible, because relying on this last category would require producing evidence on foreign law.

New Article [4.1] Competent court or authority

An application for the recognition and enforcement of an insolvency-related judgment shall be brought to [*specify the court, courts, authority or authorities competent to perform recognition or enforcement in the enacting State*].

Comment

Guidance is needed for the applicant as there will not necessarily be an insolvency proceeding open in the state where enforcement is sought. As opposed to the Model Law on Cross-border Insolvency, which deals with the coordination of opened insolvency proceedings for the same debtor in various jurisdiction, this Law is intended to apply primarily in situations where there is no insolvency proceedings open in the state where enforcement is sought. This provision is intended to specify where the application can be brought.

New Article [4.2] Notification of application and summary recognition where not contested

1. An application for the recognition and enforcement of an insolvency-related judgment shall be notified to the judgment debtor and the insolvency representative, or the group representative of the planning proceeding, of the court where the judgment was obtained and the judgment can only be recognized after the other parties have been given the opportunity to present arguments against the application.

2. Where the application is not contested, the insolvency-related judgment may be recognized summarily, without a formal hearing.

3. An application for the recognition and enforcement of an insolvency-related judgment can be accompanied by a request for provisional relief under Article 15.

4. A request for provisional relief under Article 15 does not prevent a party from seeking any additional provisional relief available under the law of the jurisdiction where enforcement is sought.

Comment

The procedural requirements should clearly spell out that the party seeking recognition should properly notify the judgment debtor of the action taken against him. This procedural requirement is consistent with the ground for refusing recognition and enforcement found in Article [12(a)] dealing with notification in the originating state.

New Article [4.3] Interim Protective Relief

1. A party may, without notice to any other party, make a request for interim protective relief together with an application for recognition and enforcement of an insolvency judgment directing a party not to frustrate the purpose of the provisional relief requested or the judgment, as the case may be.

2. Immediately after the receiving court has made a determination in respect of an application for an interim protective relief ex parte, the court shall order notice to be given to all parties of the request for the interim measure, the application for the interim protective relief, the interim protective order, if any, and all other communications between any party and the court in relation thereto. At the same time, the court shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

3. The court may require any party to disclose promptly any material change in the circumstances on the basis of which the interim or provisional relief was requested or granted.

Comment

Article [15] provides the ability for the receiving court to grant relief of a provisional nature. That provision is needed in order to ensure the protection of assets in the period between the application for recognition and enforcement and the decision by the court to recognize and enforce it. New Article [4.3] empowers receiving courts to issue interim protective measures *ex parte*. Given the nature of the remedy, a number of procedural safeguards are put in place to ensure the party(ies) against whom the measures are issued is (are) adequately protected.

The proposed wording is inspired from the Model Law on International Arbitration.

Article [7] Public policy exception

Comment

Article [7], as currently drafted, only preserves the ability of a court to have recourse to public policy for refusing to take action, if the action that it is requested to be carried out is manifestly contrary to public policy. In order to benefit from the public policy exception, the party relying on the exception must identify elsewhere in the domestic legislation of the enacting state a public policy principle that is applicable. The provision merely preserves existing public policy principles. For that reason, it is suggested that a specific ground for exclusion be included in Article [12] dealing with the grounds to refuse recognition and enforcement of an insolvency-related judgment. No changes to Article [7] are suggested.

Article [8] Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application ~~and the observance of good faith~~.

Comment

The good faith requirement is typically found in substantive international instruments, such as the *United Nations Convention on the International Sale of Goods*, the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, or the *United Nations Convention on the Use of Electronic Communications in International Contracts*. It is usually not found in instruments dealing with the recognition and enforcement of foreign decisions or in instruments setting procedural mechanisms, such at the *Hague Convention on Choice of Court Agreements*, the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, or the *ICSID Convention*. One notable exception to that dichotomy is the UNCITRAL Model Law on Cross-border Insolvency.

Article [9] Effect and Enforceability

Comment

It is suggested to consider eliminating redundancies between Articles 9 and 11. In our view, it might be counterproductive to state twice that for a judgment to be enforceable, it needs to have effect and be enforceable in the originating state.

Article [10] Application for recognition and enforcement of an insolvency-related Judgment

~~1. A foreign representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related~~

~~**judgment may apply to the court in this State for recognition and enforcement of that judgment, including by way of defence.**~~

[…]

Comment

Because of the changes to Article [4], paragraph [10 (1)] should be deleted.

New Article [10.1] Judgment used by way of defence

Nothing in this Law requires a party to seek recognition and enforcement of an insolvency-related judgment where the judgment is used as a defence in a proceeding and the judgment can be received in evidence by the court, without the formal procedural requirements of this Law, by application of its rules of procedure and evidence.

Comment

In some jurisdictions, a foreign judgment is a fact that can be introduced as evidence in a court proceeding and, as a result, be used as a defence in that court proceeding. This provision is intended to preserve this evidentiary rule for enacting states wishing to allow the presentation of judgments as defence without the formal requirement of recognition and enforcement set out in this Law.

Article [12] Grounds to refuse recognition and enforcement of an insolvency-related judgment

Recognition and enforcement of an insolvency-related judgment may be refused if:

[…]

a.1) Recognition and enforcement of the insolvency-related judgment would be manifestly contrary to the public policy of this State;

[…]

[e.1) the judgment has been satisfied or the parties have agreed, by agreement to that effect or through a reorganization or other court-supervised mechanisms, that the obligations found in the judgment have been replaced by new legal obligations].

[…]

Comment

In addition to the subparagraphs found in Article [12], it is proposed to add a new subparagraph a.1) to deal with the public policy exception. The reasons for this inclusion are found in the comment on Article [7].

Some international instruments specifically cover the satisfaction of a judgment as a ground for setting aside the enforcement of a foreign judgment (e.g., Canada-United Kingdom Civil and Commercial Judgments Convention, Article IV).

A number of decisions rendered by insolvency courts are transitory or their legal effect is superseded by subsequent developments, such as reorganization plans. In order to prevent creditors from seeking payment in a foreign jurisdiction of such extinguished or superseded judgments rendered during the insolvency proceeding, subparagraph e.1) prevents a judgment that is either satisfied or the subject of a novation from being recognized and enforced. For example, provisional freezing orders requiring that assets be vested in the insolvency administrator pending a final decision on priority rights of secured creditors, which is extinguished after the adoption of a reorganization plan, would fall under this exclusion. As a result, a

court where recognition and enforcement of the freezing order is sought would refuse recognition and enforcement.

Given the suggested changes to the definitions, in particular to the definition of "insolvency-related judgment" the Working Group might wish to consider whether some of the exclusions are still needed (subparagraphs c) to h)).

Article [14] Severability

Recognition and enforcement of a severable part of an insolvency-related judgment ~~shall~~ may be granted where recognition and enforcement of that part is applied for, or where only part of the judgment is capable of being recognized and enforced under this Law.

Comment

Replacing the word "shall' by "may" allows the protection of creditors' whose interests might be adversely affected by the recognition of only part of a judgment. With this change, a court is not compelled to recognize part of a judgment because the unenforceable portion of the judgment is severable. It may however recognize it.

C. Relationship between this Law on the Model Law on Cross-border Insolvency

An important aspect for the effective operation of this Law is that it applies in a manner that is not inconsistent with the Model Law on Cross-border Insolvency. This means avoiding inconsistencies in the event the receiving state has adopted the Model Law as well as in situations where the receiving state has not adopted the Model Law, but only this Law with the view of recognizing foreign insolvency-related judgments. The latter situation may be chosen by states that have not decided to foster judicial cooperation in the form promoted by the Model Law, but are of the view recognition and enforcement of insolvency-related judgments is an adequate tool in achieving greater cross-border judicial cooperation. The work of UNCITRAL should not *de facto* exclude this form of judicial cooperation. It too may lead to the better coordination of cross-border insolvency proceedings. For that reason, both this Law and its related Guide to Enactment should discuss the options open to enacting states, including for those wishing to enact this Law, but not the Model Law on Cross-border Insolvency.

Some comments in Part B already discussed the relationship between the existing Model Law and this Law (see comments in relation to the definition of "insolvency-related judgment", "foreign main proceeding" and "planning proceeding"). They are designed to ensure a consistent treatment of the same concepts across the various pieces of insolvency legislation.

As discussed above, this Law can be used to ensure recognition and enforcement of an insolvency-related judgment issued by a foreign main proceeding. This Law is therefore complementary to the Model Law on Cross-border Insolvency. However, this Law is not intended to ensure recognition of judgments in the situations where such recognition can be sought under the Model Law.

There is an inconsistency in the interpretation of the Model Law on Cross-border Insolvency that may justify a slight clarification. Domestic courts in some jurisdictions have been tempted to limit the recourses that are available as "relief" under Article 21 of the Model Law. Specifically, some courts have taken the view the recognition and enforcement of a judgment is not a relief available under the Model Law. As this Law does not cover all situations that fall under the scope of the Model Law on Cross-border Insolvency, it is recommended that the following amendment to the Model Law be adopted.

The Model Law on Cross-border Insolvency is amended as follows:

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

[…]

c.1) the recognition or the enforcement of a judgment;