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Observations by France

Note by the Secretariat

The Government of France 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.



Annex

France's observations on document A/CN.9/WG.V/WP.128 entitled "Facilitating the cross-border insolvency of multinational enterprise groups"

1. The document for consideration by the Working Group at the next session of Working Group V on cross-border insolvency of multinational enterprise groups is divided into two parts.

Part I deals with provisions for possible inclusion in domestic insolvency law.

2. The general introduction to the document explains that Part I focuses on a coordinated insolvency solution developed for the group as a whole or for some of its parts. However, subsequent developments, in particular in section I.B. (points 14 to 18), refer to the centre of main interests of the "group insolvency solution" which would serve to limit the commencement of proceedings affecting different group members. The coordinated insolvency solution referred to in the general introduction to the document appears therefore to involve the determination of a court having jurisdiction by virtue of the centre of main interests of the "group insolvency solution".

3. Sanctioning such an interpretation of the notion of centre of main interests entails, inter alia, risks of unpredictability and "forum shopping". In addition, it appears to be contrary to the consensus that had emerged during previous sessions of Working Group V and which is recalled, inter alia, in paragraph 12 of working paper A/CN.9/WG.V/WP.120 entitled "Facilitating the cross-border insolvency of multinational enterprise groups" discussed at the 45th session (New York, 21-25 April 2014).

Part II contains draft legal provisions for the purpose of developing a regime for international recognition.

4. Taking into account the serious reservations expressed at the 46th session, including reservations relating to point 16 of document A/CN.9/WG.V/WP.124, the preamble no longer mentions, among the objectives, either facilitating participation of several members of an enterprise group in a single proceedings, or limiting the number of insolvency proceedings affecting members of a group.

5. Among the current objectives, (c) mentions coordination of and cooperation between insolvency proceedings affecting members of an enterprise group, and (d) participation of any member, whether solvent or insolvent. However, despite those objectives, which France supports, paragraph (i) of article 2 on definitions concerns the term "enterprise group insolvency solution" and provides that this solution would be implemented in a proceeding in a State that is the centre of main interests of at least one enterprise group member.

6. As a result, France considers that there is a contradiction between the objectives set forth in the preamble and the drafting proposals in the remainder of the paper. In addition, article 5.1. in section II.B. provides for cases in which a foreign group proceeding is automatically recognized, which compounds the contradiction.

7. Accordingly,

France would like to draw the attention of the Working Group to the need to match objectives and drafting proposals. As matters stand, the drafting proposals present risks and may lead to abuses, encouraging “forum shopping” and allowing an enterprise group member that is the first to commence group proceedings to ensure that its own interests prevail over those of other enterprises belonging to the same group. The drafting proposals are also problematic regarding the independence of the courts, an independence which is based on clear and foreseeable rules on jurisdiction.

In accordance with the objectives set forth in the general introduction of document concerning Part I and in the preamble to Part II, France believes that the focus should be placed solely on facilitating cross-border insolvency proceedings affecting multinational enterprise groups by way of procedural coordination and cooperation between courts and insolvency representatives.
