



General Assembly

Distr.: General
25 April 2005

Original: English

United Nations Commission on International Trade Law

Thirty-eighth session
Vienna, 4-15 July 2005

Coordination of work

Current activities of international organizations related to Insolvency law

Addendum

Note by the Secretariat

1. In resolution 36/32 of 13 November 1981 the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.¹ Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.² This note describes some of the activities of international organizations active in the field of insolvency law.

1. American Bar Association (ABA)

2. The Select Advisory Committee on Business Reorganization (SABRE) is a special committee of the ABA Business Law Section appointed to analyze the problems of time and cost of business reorganizations under the U.S. bankruptcy laws and to make recommendations with respect to improvements to the legislation. SABRE I, published in 2001, made three recommendations: (a) to provide for a pre-Chapter 11 “workout proceeding”, in which the debtor would be prohibited from making out-of-the-ordinary course transfers and creditors would be prohibited from enforcement actions. The workout stay would be short, 30-60 days, and could be extended by the court, but not to exceed 120 days; (b) in a Chapter 11 reorganization case, to allow the court to appoint a “plan facilitator” to help achieve consensus on the terms of a reorganization plan; and (c) to allow a court, in a Chapter 11 reorganization case, to appoint one (or more) neutral business experts



for the insolvency proceeding to facilitate dissemination of business data. SABRE II, published in 2004, made three additional recommendations. Two recommendations dealt with creditor participation in reorganization proceedings: (a) to limit the number of creditor committees to a single committee, except in extraordinary circumstances; and (b) in smaller reorganization cases where creditors might have little interest in forming a committee, to provide for the appointment of a “creditors’ representative” to monitor the case and negotiate a reorganization plan on behalf of unsecured creditors. The third recommendation was to grant to the courts broad flexibility in appointing examiners and the powers assigned to them in reorganization proceedings beyond merely investigatory powers.

2. American Law Institute (ALI)

3. The ALI’s project “Transnational Insolvency: Cooperation Among the NAFTA Countries” was a response to increasing numbers of bankruptcies of multinational economic enterprises in the NAFTA countries. Four volumes were published in 2003: Principles of Cooperation Among the NAFTA Countries, which provides an overview of the project and sets forth specific recommendations. The other three, the International Statement of United States Bankruptcy Law, International Statement of Canadian Bankruptcy Law, and International Statement of Mexican Bankruptcy Law describe the bankruptcy laws of the three NAFTA States, and set out principles governing multinational insolvency cases which involve assets located in one or more of the three NAFTA countries.³

3. Asian Development Bank (ADB)

4. The ADB provides assistance to Governments to enhance the performance of public institutions, especially courts, regulatory institutions and ministries of justice, through the establishment of legal training institutions, web-based access to training and legal research materials. Assistance to law reform in the area of insolvency law reform includes the Regional Technical Assistance (RETA) 5975: Promoting Regional Cooperation in Insolvency Law Reforms addressing (a) informal workouts, (b) intersection between insolvency law and secured transactions law and (c) cross-border insolvency. The final report is currently being finalized.

4. European Bank for Reconstruction and Development (EBRD)

5. In 2004, the EBRD completed its Legal Indicator Survey on Insolvency and its Insolvency Sector Assessment to provide stakeholders in insolvency cases with an understanding of the extensiveness and effectiveness of insolvency legal regimes in 25 of the EBRD’s countries of operations.⁴ The Legal Indicator Survey goes beyond the “law on the books” and assesses how the legislation, together with the local institutional framework (including rules of procedure, courts and judges and insolvency administrators), in each country works to create a functional (or dysfunctional) insolvency legal regime. The Insolvency Sector Assessment uses a comprehensive guideline, developed as a composite of the leading international standards in insolvency, to measure a given country’s legislative compliance with these standards. The data collected by the EBRD in the Survey and the Assessment has allowed for a unique comparison of both the extensiveness and the effectiveness of insolvency legal regimes throughout the EBRD’s countries of operations.

5. European Union

6. On 31 May 2002, EU Regulation 1346/2000 on cross-border insolvency proceedings came into force. This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community. It does not apply to Denmark. It provides specific rules of jurisdiction, applicable law and recognition of judgements, while enhancing coordination of the measures to be taken regarding an insolvent debtor's assets. The solutions rely on the principle of the opening of main insolvency proceedings with universal scope in the Member State where the debtor has the centre of his main interests, while retaining the possibility of opening secondary local proceedings in another Member State where the debtor has an establishment.

7. Following the European Parliament's discussions on amendment of the Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, an ad hoc group of government experts from the 15 Member States was set up to consider, in collaboration with the Commission, the main difficulties encountered in enforcing the Directive. As a result of those meetings, which also addressed the legal, social and economic position of the workers affected by new forms of work, the Directive was amended by Directive 2002/74/EC of the European Parliament and of the Council on 23 September 2002.

8. The Enterprise Directorate-General (DG) in its projects relating to Best Procedures to conduct benchmarking exercises on issues identified as essential to reaching the Lisbon goal,⁵ embarked on the project "Restructuring, Bankruptcy and a Fresh Start" as one of the Best Procedure Projects. An expert group was set up in 2002 and consisted of experts from 14 Member States, 7 Candidate Countries and Norway. The final report of the Expert Group "Best Project on Restructuring, Bankruptcy and a Fresh Start" was published in September 2003.

9. As a related measure and to set the agenda for entrepreneurship policy, the Commission published a Green Paper "Entrepreneurship in Europe" in 2003.⁶ After public debate on ways to make the balance between risk and reward more favourable to entrepreneurship, the Commission presented an Action Plan in February 2004, which outlined a series of key actions to address five strategic priority areas.⁷ Under the policy of reducing the stigma of failure, the Commission proposed to draw up in 2004, together with Member States' experts, principles of bankruptcy, early warning signs of financial difficulties, reasons for failure, barriers to starting afresh and portraits of failed and restarted entrepreneurs.

10. Identified by the Financial Services Action Plan (FSAP) as a top priority, the European Parliament and Council Directive 2001/24/EC on the reorganization and winding-up of credit institutions fills a major gap in the financial services legislation. The objective of the Directive is to ensure, where a credit institution with branches in other Member States fails, that a single winding-up procedure is applied to all creditors and investors. The Directive entered into force on 5 May 2001 and the deadline for implementation of the legislation in the Member States was 5 May 2004.

11. Directive 2001/17/EC on reorganization and winding up of insurance undertakings is also an integral part of the Financial Services Action Plan (FSAP). It provides that the opening of reorganization measures and winding-up proceedings

concerning insurance undertakings shall be decided by the competent authorities of the Member State in which the undertaking is authorized (home Member State) and under the home national legislation. The proceedings include all branches of the insurance undertaking in the Community and creditors are to be duly informed and treated without discrimination regardless of the Member State in which they are resident. The Directive entered into force on 20 April 2001 and the deadline for implementation of the legislation in the member states was 20 April 2003.

6. Group of Twenty

12. The sixth meeting of Finance Ministers and Central Bank Governors of the G-20 in Berlin, Germany, from 20-21 November 2004, issued the following communiqué:

“Based on an exchange of experience over the past two years, we emphasized that strong domestic financial sectors are essential in supporting economic growth and reducing external vulnerabilities. We agreed that high priority should be given to establishing stable and efficient institutions. Progress in institution building is also important for a well-sequenced liberalisation of the capital account. Emphasis must be given to implementing the relevant internationally recognised standards and codes. We highlighted the crucial role of financial sector supervision, which should pay due regard to efficiency, operational independence and accountability of the agencies involved. We welcomed the efforts of the World Bank to develop principles and guidelines for effective insolvency and creditor rights systems and we commend efforts to develop a unified international standard in this area, in collaboration with UNCITRAL, that takes into account different legal traditions. We identified stable and efficient payment systems as pivotal for the financial infrastructure and emphasised the role of central banks as a supplier and overseer of payment services. We welcomed the efforts of the IMF, the World Bank and others in promoting institution-building and the development of local capacity and agreed on the importance of closely coordinating such activities.”

7. Hague Conference on Private International Law

13. The Hague Conference collaborated closely with UNCITRAL in developing the chapter of the UNCITRAL Legislative Guide on Insolvency Law dealing with law applicable in insolvency proceedings.

8. International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)

14. INSOL is currently developing a number of publications on (i) deposit insurance systems (covering six country studies of their respective Deposit Insurance Systems: USA, Canada, UK, Hong Kong, the Netherlands and Japan); (ii) employee entitlements (25 country studies of issues affecting employees where their employer faces financial difficulty or becomes insolvent, including how an employee is defined for the purpose of formal insolvency, their entitlements in insolvency, priority of treatment, personal liability of directors in respect of unpaid wages, statutory safety nets in place, and, in the event an insolvent company is sold, the acquirers responsibilities in respect of employee claims); (iii) Directors in the

Twilight Zone (2nd edition, covering 21 countries); (iv) qualifications and skills of insolvency practitioners (a global survey of information in respect of appointments, qualifications, selection process, supervision, remuneration and the regulation of the professionals); (v) global market survey; and (vi) credit derivatives project (promoting awareness and better understanding of credit derivative issues that affect corporate restructuring). INSOL continues to co-sponsor with UNCITRAL the Multinational Judicial Colloquia on Cross-border Insolvency.

9. International Bank for Reconstruction and Development (World Bank)

15. The World Bank staff have produced draft Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. The draft Principles benchmark the effectiveness of insolvency and creditor rights systems and offer guidance to policymakers on the policy choices required to establish or strengthen a functional system for healthy debtor-creditor relations. The draft Principles have been used by World Bank staff in assessing countries' insolvency and creditor rights systems, in the form of Reports on the Observance of Standards and Codes (ROSCs). In the area of institutional frameworks related to insolvency, the World Bank has convened Global Judges Forums in 2003 and 2004 to encourage a dialogue among judges that oversee commercial enforcement and insolvency cases and to assist the World Bank to develop an Insolvency Court Practices Guide.

16. Consultations between the World Bank, the UNCITRAL secretariat and the International Monetary Fund continue towards achieving (a) consistency between the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, on the one hand, and the UNCITRAL Legislative Guide on Insolvency Law and the draft UNCITRAL Legislative Guide on Secured Transactions, on the other hand, and (b) the development of a unified international standard in the area of insolvency law.

10. International Bar Association (IBA)

17. The Section on Insolvency, Restructuring and Creditors' Rights (SIRC) of the Legal Practice Division of the International Bar Association undertakes a number of activities in the area of insolvency law. For example, it works with other international organizations (e.g. UNCITRAL, World Bank, IMF) to enhance certainty through insolvency law reform and, in particular, members have been active in developing proposals to UNCITRAL on future work on insolvency law. It liaises with multinational and national regulatory bodies and with other international institutions, such as the Group of Thirty and INSOL International. In May 2005, the Section will meet with INSOL Europe to discuss, among other things, cross-promotion and cooperation on international insolvency projects. On 20 May 2005, the Section will present a resolution to the council of the Legal Practice Division of the IBA to recognize and endorse the UNCITRAL Legislative Guide on Insolvency Law. If the resolution is adopted, the Section hopes to present the same resolution on behalf of the LPD to the Council of the IBA on 21 May. SIRC members contribute annually to the World Bank's Doing Business Report concerning the status and content of domestic insolvency laws of countries throughout the world. Originally undertaken by the former Committee J in 2002, SIRC members continue to provide annual updates to questionnaires designed

through a joint effort of the IBA, the World Bank and the Harvard Graduate School of Economics.

11. International Insolvency Institute (III)

18. The III has a number of committees that research and assess various insolvency topics including: cross-border insolvency financing (developing systems and/or procedures that will facilitate the ability of a reorganizing business that is operating internationally to obtain funding to carry on in business); corporate and professional responsibilities (comparing the responsibilities of insiders and professionals in connection with insolvency proceedings); cross-border communications in insolvency cases (promote application of the Guidelines for Court-to-Court Communications in Cross-Border Cases); expedited international reorganization procedures (developing expedited procedures to facility international reorganizations and restructurings); sovereign insolvency; transnational litigation (establishing an international database of major decisions in the international insolvency field); tax priorities in bankruptcy; European Union developments; Latin America developments; and Asian developments.

12. International Monetary Fund (IMF)

19. The IMF Fund provides expert training and advice to the authorities of member countries to help strengthen their legal infrastructure, where such issues are macroeconomically relevant. Work of relevance to insolvency includes reports comparing country practices with internationally recognized standards and codes in the areas of data dissemination, fiscal transparency, monetary and financial policy transparency, banking supervision, securities markets, insurance regulations, and accounting and auditing standards. IMF staff have produced a number of reports on corporate insolvency, bank insolvency and the restructuring of unsustainable sovereign debt, including *Orderly and Effective Insolvency Procedures—Key Issues* (1999) (analysing major policy choices to be addressed in the design of an effective corporate insolvency system).⁸

13. Organization for Economic Cooperation and Development (OECD)

20. Since 1992, the Privatisation and Enterprise Reform Unit of the OECD has been involved in a process of developing rules and policies for transition and emerging market governments in the area of legal reform, focusing on privatization, insolvency and corporate law. In the context of its special programme for Asia, the OECD has undertaken to develop a dialogue, involving member-country experts and officials, policy makers and experts from emerging market economies, on the design and implementation of insolvency systems.

21. The Forum for Asian Insolvency Reform (FAIR) was established by the OECD in cooperation with the Asia-Pacific Economic Cooperation forum (APEC) and the Asian Development Bank (ADB) with assistance from the Governments of Japan and Australia to: further develop and sustain policy dialogue on insolvency reform among Asian policy makers and senior private-sector participants; monitor and review progress in the implementation of reforms in each economy of the region; identify the main topics of interest to regional policy makers and practitioners; and help to identify country-specific technical assistance needs, which could then be addressed by bilateral donors or multilateral institutions. To date, four meetings

have been held (Bali, February 2001; Bangkok, December 2002; Seoul, November 2003; and New Delhi, November 2004), with another planned for 2005.

Notes

¹ *Official Records of the General Assembly, thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

² *Ibid.*, para. 100.

³ See <http://www.ali.org>.

⁴ See <http://www.ebrd.com/>.

⁵ At a special meeting held in Lisbon on 23-24 March 2000, the EU leaders agreed on a new strategic goal for the Union in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy.

⁶ See http://europa.eu.int/comm/enterprise/entrepreneurship/green_paper/green_paper_final_en.pdf.

⁷ See http://europa.eu.int/comm/enterprise/entrepreneurship/promoting_entrepreneurship/doc/com.

⁸ See <http://www.imf.org/external/pubs/ft/orderly/>.
