



General Assembly

Distr.: General
3 April 2007

Original: English

**United Nations Commission
on International Trade Law**
Fortieth session
Vienna, 25 June-6 July 2007

Facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings

Note by the Secretariat

1. At its thirty-eighth session (2005), the Commission had before it a number of proposals for future work in the area of insolvency law (A/CN.9/582 and Add.1-7), including the use of protocols in cross-border insolvency cases. An international colloquium was held in Vienna from 14 to 16 November 2005 to discuss this and other topics proposed for consideration.
2. At its thirty-ninth session (2006), the Commission considered the report of that colloquium (A/CN.9/596) and noted that the proposal on cross-border insolvency protocols was closely related and complementary to the promotion and use of a text already adopted by the Commission, the Model Law on Cross-Border Insolvency, which had been adopted by 11 States as the basis for legislation and was the subject of increasing interest and discussion. The Commission was of the view that it would be appropriate to consider how implementation of the coordination and cooperation provisions of the Model Law could be facilitated by making the legal and judicial experience with respect to the negotiation, use and content of protocols available, in some form, to the international legal community.
3. The Commission agreed that initial work to compile practical experience with respect to negotiating and using cross-border insolvency protocols should be facilitated informally through consultation with judges and insolvency practitioners. The purpose of this note is to provide a preliminary progress report on that work for consideration by the Commission.
4. The Secretariat consulted with judges and insolvency practitioners, taking as the starting point the UNCITRAL Model Law on Cross-Border Insolvency with respect both to the authorization provided in articles 25 and 26 for court-to-court cooperation and direct communication and the forms of cooperation listed in article 27. The consultations focussed upon what judges require to facilitate court-



to-court communication and, with respect to coordination, on the use of protocols by reference to specific examples and how they had been of particular use in those cases.

5. It was noted that protocols have been used in a number of different cross-border cases to achieve different goals. They have no prescribed format and are intended to address issues unique to a specific case, with flexibility for amendment in the event that circumstances change. Given that they are specific to the circumstances of a particular case, protocols may be negotiated at different times. In some cases, negotiation may be initiated by the parties well in advance of the commencement of insolvency proceedings; in others, a protocol may be negotiated after commencement of proceedings, sometimes at the suggestion of the presiding judge, to cover specific issues in dispute and may be in the nature of an emergency measure. The provisions of a protocol generally cover procedural issues and, in some cases, substantive issues. Issues covered may relate to governance, claims adjudication, notice, coordination of asset disposition or preservation, measures to avoid duplication of efforts, minimization of fees and expenditure, sharing of information, mapping out of responsibility for claims resolution, development of a plan of reorganization and access to courts.

6. Not all protocols are recognized or approved by the court, but where they are recognized or approved, they may have different effects; in some cases they may become binding on certain parties, in others not. It was noted that in some jurisdictions the most difficult issue with respect to the use of protocols to facilitate coordination and cooperation might be one of legal or judicial culture, rather than the formal question of whether a judge might have the power to recognize a protocol or suggest the use of such an agreement to the parties. In some instances, this was linked to the question of whether judges felt they could communicate directly with each other or preferred coordination of matters to be addressed by insolvency or legal representatives. In other instances, there might be a question of familiarity and experience with the use of protocols.

7. Beyond the use of protocols, other issues of cooperation and how it could be facilitated were discussed, both as between insolvency representatives, between courts and between insolvency representatives and the courts. Some of the different constraints that might apply to direct communication by virtue of the nature of the insolvency proceedings in question, the safeguards applicable under domestic law, relevant codes of ethics, the need to know about and respect the procedural requirements of other legal systems and language were noted.

8. The importance of coordination and cooperation in the context of group insolvencies was underlined and several issues identified; it was noted that UNCITRAL Working Group V (Insolvency law) was about to take up work on the treatment of corporate groups in insolvency and there would be a need for coordination of work on this issue.

9. Although protocols are essentially case-specific and have been used in a number of different ways to address both procedural and substantive issues, the Secretariat formed the view that it would be possible to identify a common framework of issues that could be elaborated upon to provide guidance and assistance both to practitioners drafting protocols and the judges that might have to

consider them. A draft outline of possible notes on cross-border cooperation, including cross-border protocols is set forth below.

10. That draft outline of possible notes on cross-border cooperation was discussed at the Seventh UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium held in Cape Town, South Africa from 17-18 March 2007. The participants included 65 judges and officials from 42 countries.

11. Participants from a number of countries indicated they had little experience of cross-border cooperation and coordination in insolvency cases and of protocols in particular and, accordingly, little familiarity with the idea of cross-border cooperation as introduced in the Model Law. There was a concern that judges often lacked the statutory authority provided by the Model Law, although it was noted that in some jurisdictions, judges had been able to play an active role in facilitating cooperation without needing legislative change. The discussion underlined the increasing importance not only of considering issues associated with cross-border cooperation in insolvency cases and the need for access to information on how to facilitate that cooperation, but also, at a broader level, the connection between attracting foreign investment and the adequacy of laws covering the giving and enforcement of security and of insolvency laws and systems. It was felt that greater participation in international instruments could assist a country to establish a legal framework that would help to attract investment.

12. Participants with experience of protocols emphasized their usefulness to facilitating coordination and cooperation, noting that a well-drafted protocol could greatly assist the judges involved in cross-border cases, including cases involving groups of companies. The discussion highlighted some of the challenges judges face in cross-border insolvency cases and how protocols could assist, for example, to resolve procedural issues, avoid potential conflicts on both substantive and procedural issues, and address issues such as choice of laws that may not be addressed either in national laws or in the Model Law.

13. Those participants not familiar with the use of protocols expressed some reservations, particularly with regard to procedural and substantive differences between jurisdictions and how they could be addressed. The discussion emphasized the practical need, in any consideration of how to facilitate cross-border cooperation in insolvency cases, to address those substantive and procedural differences between jurisdictions, as noted in the draft outline in section V, paragraph 7 (h), and to take account of the diversity of local legal conditions and traditions that might affect cross-border cooperation, including the use of protocols.

14. Different views were expressed with respect to cross-border communication and, in particular, on the appropriateness of direct communication between judges and the ability of judges to communicate directly. It was noted that in some countries, for example, communication between the judges involved in cross-border cases was subject to rules and practices and could not take place directly but had to be conducted formally through the chief judge or head of the court. Any consideration of how to facilitate cross-border communication, including through enactment of the Model Law, needed to take into account the effect of different legal traditions and practices, as well as cultural issues and approaches, on how communication could take place and the safeguards that would be required in

different circumstances. It was noted that the law and practice of court-to-court communication in cross-border cases was still developing.

15. The importance of adoption of the Model Law for establishing the legal framework for cross-border cooperation was raised by a number of participants together with the desirability of providing guidance, along the lines indicated in the draft outline set forth below, to both judges and practitioners on how that cooperation could be achieved to ensure effective coordination of cross-border cases.

**UNCITRAL NOTES ON CROSS-BORDER COOPERATION,
COMMUNICATION AND COORDINATION
IN INSOLVENCY PROCEEDINGS**

Draft outline of contents

I. Preamble

1. The preamble would address issues common to both the UNCITRAL Model Law on Cross-Border Insolvency and the UNCITRAL Legislative Guide on Insolvency Law, such as the importance of recycling of economic resources to promote economic stability; the need to promote orderly and efficient administration of insolvency proceedings; the need to harmonise and coordinate activities; the need to avoid impasse in insolvency proceedings; and the desirability of bringing certainty and predictability to insolvency proceedings, especially in the cross-border context.

II. Introduction to judicial cooperation

2. The Guide to Enactment to the UNCITRAL Model Law on Cross-Border Insolvency emphasizes the centrality of cooperation to cross-border insolvency cases, in order to achieve efficient conduct of those proceedings and optimal results. While the Model Law provides authorization for cross-border cooperation, there is no standard approach to how that cooperation might be achieved. The purpose of this work would therefore be to provide guidance for practitioners and judges, based upon experience and practice.

3. Some of the issues to be addressed in the introduction would include examining the grounds on which courts defer to decisions of other courts; identifying different matters required to be brought before respective courts; seeking common ground between the parties involved; and providing examples of judicial cooperation in action, particularly with respect to the use of cross-border protocols.

III. Cross-border protocols

4. One tool for facilitating cross-border cooperation and coordination is the cross-border protocol. Guidance on the negotiation and use of cross-border protocols is the core of the work proposed. It would address the following issues.

A. Preliminary issues

1. Introduction

The introduction would emphasize that there is no standard format for protocols and that they need to be tailored to address the specific issues of each case, with sufficient flexibility to accommodate changing circumstances.

2. *Advantages of protocols*

This section would discuss the advantages of using protocols, including to promote certainty; manage the expectations of parties; facilitate restructuring; promote efficiency of administration; assist in achieving cost savings by avoiding duplication of effort and competition for assets; and reduce disputes.

3. *Circumstances in which protocols can assist in facilitating cross-border cooperation and coordination of proceedings.*

This section would include a description of the use of protocols in situations where court approval was required and those where it was not required and the court consequently was not involved in the protocol; in both domestic and cross border contexts, including cross-border cases involving parallel proceedings and corporate groups; and in the context of judicial insolvency proceedings and those requiring minimal court supervision.

4. *Effect of protocols*

This section would address the scope of possible effects that a protocol might have, including the need to distinguish between those provisions intended to have legal effect and those which are statements of good intent; the extent to which contracting parties will be bound by a protocol; and the advantages of court approval.

5. *Authorization required for entry into a protocol*

This section would address the ability or capacity of parties to enter into a protocol and the manner in which procedural and substantive issues could be treated.

6. *Method and procedure of negotiation of a protocol*

7. *Approval and admissibility in court*

This section would address the preconditions for approval of a protocol, including the capacity of the parties to enter into a protocol; the procedure for obtaining approval; and the limitations that might apply to approval by the court or admissibility in the court.

8. *Safeguards*

The safeguards to be included in a protocol may be divided into those that should always be included and others that may be included as required.

Provisions that should be included might relate to ensuring that there is no derogation from court authority and public policy. Provisions that may be included might concern disclosure to interested parties; protection of rights of non-signatory third parties; and the ability to revert to the court in cases of dispute.

9. *Possible problems and means of resolution*

This section would address some of the problems that might be encountered with respect to protocols, as well as the need to ensure that the protocol could be adapted to address changing circumstances; the need to be able to revert to the court to resolve certain issues; and limitations concerning the effect of a protocol.

10. *Annexes*

Sample clauses from selected protocols that address some of the above issues might be included to illustrate how issues have been approached and relevant provisions drafted.

B. Examples of typical contents of a protocol [this section could be included in the text or as an annex]

This section would draw upon examples of protocol provisions to provide a guide to the types of issues commonly addressed, including the following:

1. *Recitals*

- (a) Scope and intent of the protocol
- (b) Parties in interest and signatories
- (c) Authentication of the protocol
- (d) Language of the protocol and of communications

2. *Definitions and construction*

To ensure a common understanding of concepts in the different States involved in a protocol, many protocols include definitions and agreed rules of interpretation.

3. *Proceedings*

- (a) Priority of proceedings
- (b) Stays of proceedings
- (c) Choice of applicable law

4. *Cooperation between insolvency representatives*

- (a) Division of the exercise of powers and allocation of responsibilities between courts and parties to the protocol
- (b) Post commencement financing: assets that can be the subject of security interests and the priorities involved
- (c) Safeguarding of assets
- (d) Use and disposition of assets
- (e) Recognition of priorities

- (f) Filing and approval of claims and distributions to creditors
- 5. *Communication*
 - (a) Content of notice and method of giving notice
 - (b) Type of information to be exchanged and means of exchange
 - (c) Confidentiality
 - (d) Methods and frequency of communication and “no surprises” pact
 - (e) Need for transparency
- 6. *Comity/deference and independence of courts*
 - (a) Where and when to file proceedings
 - (b) Identifying matters to be brought before the court
 - (c) Establishing a timetable for court proceedings and appearances
 - (d) Rights to appear and be heard by the court
- 7. *Provision for amendment, revision and termination of a protocol*
- 8. *Disputes relating to a protocol and how they will be resolved*
- 9. *Costs and expenses associated with the protocols and proceedings*
- 10. *Effectiveness of the protocol and conditions precedent to effectiveness*

IV. Possible forms of cooperation under art. 27, UNCITRAL Model Law on Cross-Border Insolvency

5. Beyond the use of cross-border protocols, the notes on cross-border cooperation might also address broader issues relevant to cooperation and communication, pursuant to article 27 of the UNCITRAL Model Law. Those issues might include the following:

- (a) Appointment of a person to act at the direction of the court [art. 27 (a)]
 - (i) Circumstances in which this might be appropriate
 - (ii) Authority – does this stay with judge or is it devolved? Does the person appointed act at the specific direction of the court or on the basis of their own authority with the permission of the court?
 - (iii) Safeguards where such a person is appointed
- (b) Communication of information as considered appropriate by the court [art. 27 (b)]
 - (i) Use of an initial communication protocol
- (c) Coordination of administration and supervision of the debtor’s assets [art. 27 (c)]

(d) Approval or implementation of agreements concerning coordination of proceedings [art. 27 (d)]: the use of protocols would be addressed as suggested in III above.

(e) Coordination of concurrent proceedings [art. 27 (e)]

(i) Coordination of stays of proceedings

(ii) Approval of reorganisation plans

(f) Other forms of cooperation [art. 27 (f)]

6. Forms of cooperation not specifically mentioned in article 27 might include the following:

(a) Questions of jurisdiction and allocation of disputes among cooperating courts for resolution

(b) Coordination of the realisation and disposition of assets

(c) Coordination of the filing, determination and priority of claims

(d) Holding of joint hearings

(e) Authorization of payments that might otherwise be vulnerable to attack

(f) Pooling of resources

V. Practical aspects of cooperation

7. Some of the practical issues that may need to be considered in order to facilitate cooperation and communication might include the following, some of which raise practical questions that relate specifically to protocols.

(a) Status of proceedings in differing jurisdictions

(b) Scope of the cooperation – does it cover procedural or substantive issues?

(c) Language/s to be used

(i) Ensuring that the parties share the same intention

(ii) Need for translation to obtain court approvals

(d) Methods of communication

(e) Initiation of cooperation

(i) Who initiates cooperation?

(ii) Who negotiates protocols?

(iii) The extent to which the parties, appointees and creditors should be involved in cooperation

(f) Issues of due process

(g) Differences of substantive law between jurisdictions with respect to protocols

(i) Mixed enthusiasm for protocols

(ii) Recognition of differing priorities of insolvency claims

(iii) Issues of legal culture

(iv) Focus of legislative intent e.g. social policy or other goals

(v) Tacit rather than formal approval or non-objection may be possible if formal approval is not available on one or both sides

(h) Negotiate and “put in a drawer” – in some instances, negotiation of a protocol will resolve relevant issues and the protocol may not need to be referred to during the conduct of the proceedings.

VI. Group issues

8. Many issues of coordination and cooperation have arisen in the context of the insolvency of corporate groups. While these issues will be relevant to the work to be done by UNCITRAL Working Group V (Insolvency Law) in its consideration of the insolvency of corporate groups, they might also be addressed in the context of developing these notes.

9. Some of the general issues identified as critical in the group context include the role of protocols in determining issues of authority between insolvency representatives and courts; the relevance of the status/solvency of members of a group to implementing cooperation; the need to assess whether the value of the whole of the group will be more than sum of its parts to determine how proceedings should be coordinated and cooperation achieved; and the general principle that there should be no cross-subsidy of creditors of different members of a group.
