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Revised Guide to Enactment of the Model Law and draft Part four of the Legislative Guide on Insolvency Law

Compilation of comments by Governments

Addendum

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II. Comments received from Governments

Tunisia

[Original: French]
[Date: 2 July 2013]

Comments on the text concerning the "Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)"

The UNCITRAL Model Law on Cross-Border Insolvency is designed to help States to equip themselves with a legislative framework that will enable them to cope more effectively with cross-border proceedings concerning enterprises that are experiencing severe financial distress or insolvency.

In order to facilitate the incorporation of the Model Law in the domestic law of the various countries, a Guide to Enactment was prepared by UNCITRAL.

Following the proposal by the United States of America that guidance should be provided on the interpretation and application of selected concepts of the Model Law on Cross-Border Insolvency, the UNCITRAL Working Group has prepared a draft for the revision of the Guide to Enactment.

An examination of the draft for the revision of the Guide prompts the following comments:[1]

Paragraph 3:

The proposed insertion of a footnote after the words "enacting State" will be highly beneficial because it will permit the scope of this term to be delimited, and this will make it possible to determine precisely the States concerned by the application of the Model Law. We recommend the adoption of this proposal.

Paragraph 4:

The addition of this paragraph will allow an affirmation of the role of the Model Law as a reference for the development of an effective cross-border cooperation framework.

Paragraphs 49B, 49C and 49D:

The Model Law establishes the principle of the direct access of the foreign representative to courts, which will mean that the need to rely on cumbersome and time-consuming letters rogatory can be avoided.

Paragraphs 49B, 49C and 49D provide fuller explanations regarding the direct and rapid access of foreign representatives of the insolvency to foreign courts and the various prerogatives accorded to them under the Model Law.

We recommend the adoption of these new paragraphs, particularly as they are well developed and better structured than the present paragraphs 28 and 29

[1] See document A/CN.9/WG.V/WP.112.

concerning the access of the foreign representative to the courts of the enacting State.

Paragraphs 37A, 37B, 37C, 37D and 37E:

The Model Law facilitates the recognition of foreign proceedings by establishing simplified procedures.

To clarify the scope of articles 15, 16 and 17 of the Model Law, the Working Group has reworded the content of paragraphs 30 and 31 (concerning the recognition of foreign proceedings contained in the Guide under consideration), providing explanations regarding the foreign proceedings concerned that can be recognized by the court, the process of recognition and the possibility of modification or termination of the order for recognition if the grounds for granting recognition were lacking at the time, have changed or have ceased to exist.

The adoption of paragraphs 37A, 37B and 37E is therefore recommended. It would be desirable, however, out of considerations of logical order, to reorganize the paragraphs so that paragraphs 37C and 37D directly follow paragraph 37A.

In addition, paragraphs 37C and 37D need to be developed much more to show the reasons for the distinction between main and non-main foreign proceeding and its impact on the course of the process.

Paragraphs 52 and 53:

Since, in paragraph 51, the Working Group has defined the scope of the concept of insolvency proceedings in the meaning of the Model Law, paragraphs 52 and 53 on the same subject are no longer needed. It would be desirable to delete them.

Paragraphs 23B, 23C, 24, 24A, 24B, 24C, 24D, 24E, 24F and 24G:

For a **foreign proceeding** to benefit from the provisions of the Model Law, it must be covered by the definition of this term[2] contained in article 2(a) of the said Model Law.

An analysis of this definition reveals that collective foreign proceedings must satisfy a combination of criteria that might be subject to various interpretations. The expressions “collective proceeding”, “pursuant to a law relating to insolvency”, “control or supervision by a foreign court” and “for the purpose of reorganization or liquidation” therefore needed to be defined, and this has been achieved in a clear manner in the paragraphs listed above.

It is more than desirable that the definitions of these various criteria should be adopted.

Paragraphs 123D, 123F, 123G, 123I, 123K and 123M:

The concept of a debtor’s centre of main interests is fundamental to the operation of the Model Law.

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[2] That is to say, “foreign proceeding”.

This concept being difficult to define, the Model Law, in article 16, establishes a presumption that it is the debtor's place of registration that corresponds to the attributes in question. In certain cases, however, the debtor's centre of main interests may not coincide with the place of registration and it was therefore necessary to specify other factors allowing the centre of main interests to be identified.

In paragraphs 123F, 123G and 123I, the Working Group has sought to draw up a non-exhaustive list of factors that will enable the court to identify the centre of main interests in cases where the first two criteria indicated[3] have failed to solve the problem. The Working Group has also put forward certain solutions where the debtor's centre of main interests has moved shortly before the commencement of proceedings, or even between the time of the application for commencement and the actual commencement of the proceedings.

These various solutions will make it easier for the court to determine the debtor's centre of main interests in particular cases. The adoption of these paragraphs is therefore desirable.

Paragraph 166:

The comments in this paragraph seem to contradict article 23, paragraph 1. That article gives the foreign representative standing to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors without any restriction, whereas the Working Group says that this provision has a restricted scope, without putting forward clear and convincing arguments on this point. It would be desirable to rewrite the present paragraph so that it is consistent with the content of article 23, paragraph 1.

Paragraph 173A:

The Working Group states in this paragraph that cooperation with foreign courts and representatives under articles 25, 26 and 27 of the Model Law is not dependent on recognition of the foreign proceeding and may occur before there is an application for recognition, something that is not clear from a reading of these articles. Since such provisions can only help to encourage international insolvency cooperation in all its forms, with the aim of achieving the best results for all the parties concerned, it is desirable that this paragraph should be adopted.

Comments on the text concerning directors' obligations in the period approaching insolvency

The Working Group set up by UNCITRAL, in the document under consideration,[4] has sought to identify basic principles to be reflected in the law concerning directors' obligations when an enterprise faces imminent insolvency or insolvency becomes unavoidable.

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[3] Namely that:
(a) The location is readily ascertainable by creditors;
(b) The location is where the central administration of the debtor takes place.

[4] Document A/CN.9/WG.V/WP.113.

Such obligations may operate to encourage directors to act prudently and take early steps to stop the decline of the company with a view to protecting existing creditors from even greater losses and incoming creditors from becoming entangled in the company's financial difficulties.

With regard to where this text should be inserted, it would be desirable to include it as an additional section of chapter III (part two) entitled "Participants", that would make it possible to have a general view of the different actors in the insolvency, including directors, particularly as the application of the obligations referred to in this study — once they are incorporated in domestic legislation — will take effect when the company has become insolvent.

An examination of the document on directors' obligations in the period approaching insolvency prompts the following comments:

Recommendations 1 and 2:

Purpose of legislative provisions:

In addition to the objectives set out in subparagraphs (a), (b) and (c), it is recommended that the purpose of provisions addressing the obligations of those responsible for making decisions concerning the management of a company that arise when insolvency is imminent or inevitable should be:

- To preserve the freedom of directors to discharge their obligations and exercise their judgement appropriately;
- To discourage wrongful conduct and excessive risk-taking.

Recommendation 4:

The obligations mentioned in recommendations 1 and 2 can, in view of their content, only apply to the de jure directors of the company facing an actual or imminent insolvency. It would therefore be desirable to specify that the person owing the obligation is **any person formally appointed with responsibility for making decisions with respect to management of the enterprise facing an actual or imminent insolvency**.