

# **TRANSBORDER INSOLVENCY**

**INTERNATIONAL CO-OPERATION  
ON CROSS-BORDER INSOLVENCY  
ISSUES - AN IMPORTANT  
LEGISLATIVE INITIATIVE OF THE  
UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW  
(UNCITRAL)**

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**SUMMARY OF PROJECT**

1. The United Nations Commission on International Trade Law (UNCITRAL) has embarked on a project designed to facilitate international co-operation and co-ordination in dealing with cases of cross-border insolvency. The project will offer to states a legislative framework, most likely in the form of model national legislative provisions, for judicial co-operation, court access for representatives of foreign insolvency proceedings, and recognition of foreign insolvency proceedings. Like other model laws and conventions prepared by UNCITRAL, the model provisions will be designed for use in all types of legal systems and by states at various levels of economic development.

2. This work of UNCITRAL is not aimed at achieving a substantive unification of insolvency laws. It has the limited but useful objective of providing a legislative basis and procedures for dealing with cases of cross-border insolvency. This modest objective is desirable since cases of cross-border insolvency are increasing and many jurisdictions remain without the legislative framework to enable co-ordination and co-operation among jurisdictions that would help to preserve asset value and rescue financially troubled but viable businesses. Such a situation impacts negatively not only on creditors and the predictability of investment in states seeking to attract investment, but also on other interested parties, in particular employees of businesses in financial difficulty.

**PREPARATORY WORK UNDERTAKEN THUS FAR**

3. UNCITRAL has established an intergovernmental Working Group on Insolvency Law, which is preparing a draft legal text for

adoption by the Commission. The next session of the Working Group is taking place at United Nations Headquarters in New York from 1 to 12 April 1996. At that session, the Working Group is to consider a first draft of a set of model legislative provisions (copy attached, United Nations document A/CN.9/WG.V/WP.44).

4. Membership in the Commission and its Working Groups consists of 36 states elected by the General Assembly for six-year terms on the basis of a geographical distribution formula. However, participation in the sessions of the Commission and its Working Groups is open to all states, who receive invitations to participate through their Permanent Mission to the United Nations.

5. In addition to the primary role of governments in the UNCITRAL process, interested international organisations participate, including those representing practitioners and others with an interest in projects undertaken by UNCITRAL. Valuable input is being received from the International Association of Insolvency Practitioners (INSOL) and Committee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA). Such input, including that received at the multinational UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22-23 March 1996), has helped focus UNCITRAL's work on a project that is both feasible and desirable.

6. Some main aspects of the emerging model legislative provisions are summarized below. It may be noted that the description below is based on deliberations at the Working Group level, which are still in progress, and should therefore be regarded as tentative.

**A "MENU OF OPTIONS" FOR STATES**

7. It is likely that the model legislative provisions will to one degree or another present states with a "menu of options". This would be in recognition of the fact that states differ in their traditional policy approaches regarding insolvency and procedural frameworks, as well as in the degree and manner in which they would extend co-operation to other states or particular groups of states. It is envisaged that there would be a core set of provisions recommended for adoption by all states. Though this core module might be relatively modest in what it would achieve, it

would nevertheless represent significant international progress in view of the prevailing fragmentation and divergence of law at the national level for dealing with cross-border insolvency. Such a core module could include, for example:

- authorizing judges both to extend and to solicit co-operation;
- the right of foreign insolvency representatives to direct access, in a limited appearance, to the competent court or authority for obtaining recognition and ancillary relief, thereby avoiding time consuming or less predictable avenues (e.g., letters rogatory and other types of diplomatic or consular communications incapable of providing the speedy response needed to protect assets against dissipation or concealment; exequatur proceedings and notions of comity);
- simplified procedures for foreign representatives to evidence the opening of foreign proceedings and appointment (by presentation of certified copy of decision or order opening proceedings, thereby avoiding time-consuming legalization requirements);
- applicability of recognition rules to proceedings treated as insolvency proceedings in the jurisdiction of origin, i.e. proceedings opened under insolvency laws or other laws relating to insolvency proceedings (e.g., company laws), provided they are under the overall supervision of a court or other competent state authority (thereby encompassing both liquidation and reorganization proceedings (including debtor-in-possession), as well as voluntarily initiated proceedings, and regardless of whether the debtor is a natural or legal person (though an option may provide for exclusion of insolvencies of non-traders);
- authorization for locally-appointed administrators to act as foreign representatives of proceedings originating in the enacting state, a legislative gap that has proven to be a problem in some jurisdictions;
- staying of local individual creditor enforcement actions upon recognition of a foreign proceeding, with possible options for exclusion from such a stay of enforcement

of secured claims, rights in rem, and reservation of title arrangements;

- the right of foreign representatives to intervene in collective proceedings in the enacting state;
- access and national treatment for foreign creditors.

#### OTHER POSSIBLE ISSUES

8. In addition to the above issues in a core set of provisions, a number of other aspects of co-operation and co-ordination in cross-border insolvencies may be addressed in the UNCITRAL model legislative provisions, to one extent in the form of options for states. One area concerns the rules for determining whether any given foreign proceeding should be recognized. An approach in this regard may be based on a rebuttable presumption that the foreign proceeding is based on a substantial jurisdictional link to the debtor. Another approach would involve the recognizing court in a case-by-case examination of the jurisdictional competence of the foreign court on the basis of one or more possible connecting factors.

9. On the question of the "effects" of recognition, a two-tier approach is emerging, involving a "minimum" list of automatic effects (e.g., the stay of individual creditor enforcement actions, with possible exemptions, referred to above and authorization of information gathering by the foreign representative). In addition, the court would be authorized to grant additional forms of relief, taking into account the powers of the foreign representative under the law of his appointment, local law and public policy.

10. It remains also to determine what recommendation would be made to states that would wish to include in their legislation rules on the effects of recognition of a foreign proceeding on the jurisdiction to open local insolvency proceedings. An additional possible module would present model rules for establishing a hierarchy between concurrent proceedings.

#### PROSPECTS FOR COMPLETION OF WORK

11. It is expected that following several additional Working Group sessions, the draft model legislative provisions will be presented to the Commission for final revision and adoption at its annual session in 1997. Judging by other UNCITRAL legal texts, it can be expected that

the model legislative provisions would be used by states from various legal systems to "upgrade" their insolvency laws to deal in a speedy and efficient way with the increasing stream of cross-border insolvencies. Examples of adoption and use of UNCITRAL legal texts across legal systems include in particular the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

12. In addition to the model provisions on cross-border insolvency, the Commission is likely to issue a guide to enactment of the provisions for use by parliaments and executive branches of government. Such a guide has been particularly useful in the enactment of legislation based on the UNCITRAL Model Law on Procurement, and would be an adjunct to the technical assistance and consultation services provided by the UNCITRAL Secretariat in the preparation of legislation in the commercial law area.

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March 1996