

IAIR Recognition Reciprocity Report 2006 - Uncitral 2005 Addendum

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Developments in Insolvency Law: Adoption of the Uncitral Model Law on Cross-Border Insolvency

Note by the Uncitral Secretariat

Introduction

1. This note reports on developments in the area of cross-border insolvency law, including with respect to the adoption of the Uncitral Model Law on Cross-Border Insolvency.

2. Legislation based on the Model Law has now been adopted by Eritrea; Mexico [Footnote 1]; within Serbia and Montenegro, Montenegro [2]; Japan [3]; South Africa [4]; Romania [5]; Poland [6]; and the British Virgin Islands [7]. The United Kingdom [8] has enacted legislation enabling the Model Law to be implemented by regulation. A number of countries have draft legislation based upon the Model Law under consideration, including United States of America, Argentina and Pakistan, while other countries have recommended adoption of such legislation, including Australia, New Zealand and Canada. The Spanish Insolvency Act 22/2003, which came in to force in 2004, includes international insolvency provisions inspired by the Model Law as well as provisions based on the ECR.

3. While some of the legislation adopting the Model Law has enacted the text largely unchanged, some changes, of varying degrees of significance, have been made. The following summary of those changes is provided by way of illustration, but since it is based upon consideration of much of the legislation in translation, it may not accurately reflect the exact provisions of the original legislation in each case.

4. Scope of the Legislation - Article 1

As foreshadowed in article 1 (2) of the Model Law, countries have excluded certain types of entities from the application of the provisions of the Model Law. Examples include: entities such as banking and insurance institutions (for example, Romania and Poland); financial and investment institutions, commodity exchange members, clearing houses, brokerage companies and traders (for example, Romania); persons who hold or have held prescribed financial services licences of a designated type (for example British Virgin Islands); and consumers (for example, Mexico). Reflecting the scope of its insolvency law, one country has limited the provisions to proceedings concerning "merchants" (Mexico).

5. Centre of Main Interests - Articles 2 and 16(3)

One example adds to the presumption of article 16 (3) concerning "centre of main interests" the additional possibility of the centre of main interests being the professional domicile of a legal person undertaking an economic activity or independent profession (Romania).

6. Application to Commence and Participate in Proceedings - Articles 11 and 12

In one example (British Virgin Islands), an application under article 11 to commence local proceedings and participation in proceedings regarding the debtor under article 12 both require the foreign proceedings to have been recognized.

7. Notification of Foreign Creditors - Article 14

One law (British Virgin Islands) provides for additional time to be given to foreign creditors with respect to notice and submission of claims.

8. Application for Recognition - Article 15

In most examples, applications for recognition can be made, in accordance with article 15, by the foreign representative. In one case, the debtor may also make such an application (Japan).

9. Decision to Recognize - Article 17

A number of examples have omitted the requirement under article 17(3) that courts should decide upon an application for recognition at the earliest possible time (Japan, Mexico and Poland).

10. Subsequent Information - Article 18

A number of countries have extended the obligation to inform the court to cover "any" changes, not only "substantial" changes, as required by article 18, in the status of the recognized foreign proceedings or the status of the foreign representative's appointment (for example, Poland and South Africa).

11. Interim Relief and Relief available on Recognition - Articles 19 and 20

(1) One law has added a requirement that the insolvency representative must notify the debtor as soon as possible or within a time specified by the court where an order for interim relief is made (British Virgin Islands). Several countries have slightly amended the relief available upon recognition to align article 20(1) with domestic law. In those cases, the legislation provides that the stay does not apply to commencement or continuation of individual actions, but only to enforcement or execution against the debtor's assets (for example, Japan and Mexico).

(2) In one example, relief is not available automatically on recognition as provided by article 20, but rather upon application to the court (Japan).

(3) In a further example, exercise of the right to alienate, encumber or dispose of the debtor's assets is suspended from the time of recognition, except where the trader carries out acts, operations and payments in the ordinary course of business (Romania). Such acts can be the subject of a request for relief by the foreign representative following recognition. The same legislation also provides that a creditor holding a claim guaranteed by a mortgage, pledge or other real movable guarantee or possessory lien can seek relief from the stay.

12. Cooperation and Direct Communication between Courts - Articles 25, 26 and 27

One country (Japan) has not adopted article 25, and limits article 26 to cooperation between foreign and local representatives. Article 27, suggesting forms of cooperation, also has been omitted from a few examples (Japan, Poland), although the Polish law does indicate that specified information should be conveyed or sought. A further variation (Poland) provides for the judge and court to communicate directly with the foreign court and representative, but requires the person administering the proceedings under the local law to communicate with the foreign court or representative through the judge, rather than directly, as permitted by article 26 (2) of the Model Law. One law (British Virgin Islands) specifies that the right to communicate directly (article 25 (2)) be subject to the rights of parties to notice and participation at hearings.

13. Coordination - Articles 28-30

In at least two laws, the provisions of chapter V of the Model Law dealing with concurrent proceedings have been varied or omitted (e.g. Japan, Poland). In one example (Japan), a single proceeding model is adopted, so that there will be either recognition of a foreign proceeding or a domestic proceeding, but not both. Where a domestic proceeding has already commenced, an application for recognition of a foreign proceeding involving the same debtor will be dismissed, unless it is a foreign main proceeding and meets certain other conditions concerning the interests of creditors. If the foreign proceeding is recognized, the domestic proceedings will be stayed. In another example (Romania), the opening of local proceedings following the recognition of foreign main proceedings requires an establishment, rather than the presence of assets referred to in article 28 of the Model Law.

14. Reciprocity

Although rejected as an approach during negotiation of the Model Law, a number of countries have adopted provisions applying the Model Law on a reciprocal basis. The nature of these reciprocity provisions varies. In some examples, the relevant provision states the need for reciprocity (Mexico) without any indicator as to what might satisfy that requirement or provides that the court should establish the existence of reciprocity (e.g. Argentina). In another example, the legislation provides the Model Law will only apply where a country has been officially designated, a process requiring approval by the Parliament (South Africa). To date, it appears that no countries have yet been designated under that procedure. A similar provision (British Virgin Islands) requires designation by notice in an official publication. Another example (Romania) specifies that there must be reciprocity of recognition of foreign judgements.

15. Other Proposals

17. New Zealand has taken a decision to enact the Model Law and introduce an additional scheme that would allow a more extensive form of coordination with specified countries than provided for under the Model Law. This scheme is based upon designating specific types of insolvency proceedings under the law of particular countries, which will be entitled, amongst other things, to automatic recognition and relief upon the foreign representative giving notice to a specific public officer. Local proceedings could not be commenced in New Zealand (other than in exceptional cases with leave of the court), and the foreign representative would have the same powers as a liquidator under New Zealand insolvency legislation.

Footnotes:

[1] Ley de Concursos Mercantiles, 12 de Mayo de 2000

[2] Law on Business Organization Insolvency February 2002

[3] Law relating to Recognition and Assistance for Foreign Insolvency Proceedings (Law No 129 of 2000)

[4] Cross-Border Insolvency Act 42 (2000), Article 34

[5] Law No 637 of 7 December 2002 on Regulating Private International Law Relations in the Field of Insolvency.

[6] Law on Insolvency and Restructuring of 28 February 2003

[7] Insolvency Act 2003. The Act, which came into force in August 2004, includes provisions on cross-border insolvency (Part XVIII); this Part has not yet entered into force. Part XIX Orders in Aid of Foreign Proceedings, which has entered into force, allows applications from foreign representatives for various types of relief to aid the foreign proceedings and specifies the matters to be taken into account by the court in ordering that relief. This Part includes provisions similar to those included in articles 5, 7 and 10 of the Model Law.

[8] Insolvency Act 2000.