

or other interested parties in a foreign State have an interest in requesting the opening of or participating in a proceeding under the insolvency laws of the enacting State. Paragraph 2 of the article provides for the enacting State to exclude from the application of this Law, any types of designated entities such as banks or insurance companies, which may be subject to a special insolvency regime under its national laws. The exclusion was generally acceptable, because insolvencies of financial services institutions usually required prompt and discrete action, and hence were administered under special regulatory regimes in various States. To ensure transparency, it was considered that all such exclusions should be expressly mentioned by the enacting State under paragraph 2.

Article 2 on 'Definitions' defines the terms, "foreign proceeding", "foreign main proceeding", "foreign non-main proceeding", "foreign representative", "foreign court" and "establishment". "Foreign proceeding" for the purposes of this Law means a collective judicial or administrative proceeding including a proceeding opened on an interim basis, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation. A "foreign main proceeding" taking place in the State where the debtor has the centre of its main interests. A "foreign non-main proceeding" is defined as a foreign proceeding, other than a foreign main proceeding, taking place in the State where the debtor has an establishment. The term "establishment" in this context, is defined to mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. A "foreign representative" is a person or body, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding. "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

Article 3 on 'International obligations of this State' explicitly provides that wherein the obligations imposed on a State under this Law conflicts with any other obligations, arising out of a treaty or an agreement to which the State may be party, then the requirements of such treaty or agreement would prevail.

Article 4 entitled 'Competent court/authority' provides for designating a court or any other authority in the enacting State to perform the functions referred to in this Law relating to recognition of foreign proceedings and co-operation with foreign courts. This would increase the transparency and ease the use of insolvency legislation, for the benefit of foreign representatives and foreign courts. Article 5 calls for the enacting State to authorise a person or body administering a liquidation under its laws, to act in a foreign State on behalf of a proceeding in the enacting State, as permitted by the applicable foreign law.

Article 6 on 'Public policy exceptions' enables the courts of the enacting State from refusing to take an action contemplated by this Law, if such action would be manifestly contrary to the public policy of the State. Bearing in mind the possibility of the domestic courts, attempting to give a broad interpretation of the term 'public policy' - which would undermine the achievement of the objectives of this Law, the Commission emphasised that the use of the term 'manifestly' in Article 6 was intended to convey the meaning that the public policy exceptions should be interpreted restrictively and are meant to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

Article 7 on 'additional Assistance under other laws' provides that, this Model Law does not limit the power of the courts to render additional assistance to a foreign representative, under laws of the enacting State. Article 8 on 'interpretation', lays down a rule of construction that in the interpretation of the Model Law, courts might bear in mind the international origin of the Law and the need to promote uniformity in its application and the observance of good faith.

Chapter II, (Articles 9 to 14) deals with the substantive and procedural aspects, as regards facilitating access of foreign representatives and creditors to the courts of the enacting State. Article 9 on 'Right of direct access', entitles a foreign representative to apply directly to a competent court in the enacting State for the purpose of obtaining any relief available under this Law. The main purpose of this provision is to ensure direct access by the foreign representative to the courts, without having to meet the formal requirements

such as licences or consular actions. Article 10 on 'Limited jurisdiction' provides that the sole fact that a request, pursuant to this Law, to the courts of the enacting State is made by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the Jurisdiction of the courts of the enacting State, other than for the purpose of the request. This limitation on jurisdiction is not absolute. Other grounds under the laws of the enacting State, such as the possible misconduct and the resulting liability of the foreign representative are not affected by this limitation.

Article 11 on 'application by a foreign representative to commence a proceeding', entitles a foreign representative to apply for commencement of a proceeding under the laws of the enacting State, provided other conditions for opening such proceedings are satisfied. Hitherto it had been noted that national insolvency legislations, while enumerating persons who may apply for commencement of proceedings, often did not refer to a foreign representative. The explicit reference to the foreign representative, under Article 11 is intended to dispel this ambiguity. Further, as recognition was the procedure by which the foreign representative was given standing before the courts of the enacting State for the purposes of the Model Legislation, there were objections to allow a foreign representative to apply for the commencement of proceedings, before he was formally accorded recognition by the court. However, the Commission was of the view that such an arrangement was crucial in cases of urgent need for preserving the assets of the debtor.

Article 12 on 'participation of a foreign representative in a Proceeding' entitles a foreign representative, upon recognition of a foreign proceeding, to participate in a proceeding concerning the debtor in the enacting State. The expression 'participate' is intended to include rights such as the right to be heard in an insolvency proceeding and to make proposals therein.

Article 13 on 'Access of foreign creditors to a proceeding' provides for access of foreign creditors to a proceeding under the laws of the enacting State. Paragraph 1 embodies the principle of nondiscrimination, whereby foreign creditors have equal rights as the local creditors in the enacting State, as regards the commencement and participation in an insolvency proceeding. Paragraph 2 makes it clear that the equality of treatment embodied in paragraph

1, does not affect the provisions on the ranking of claims in insolvency proceedings. Nevertheless, it provides a minimum ranking for claims of foreign creditors. Hence, the claims of foreign creditors shall not be ranked lower than unsecured non-preferential claims. An alternative provision to paragraph 2, allows discrimination against foreign tax and social security claims.

Article 14 'Notification to foreign creditors' lays down the procedure for issuing notification to foreign creditors of an insolvency proceeding under the laws of the enacting State. Paragraph 1 provides that, whenever under the laws of the enacting State, notification is required to be given to creditors in that State, then such notification shall also be given to "known creditors that do not have addresses" in this State. As in many cases, the deadline for filing claims was not established upon commencement of the proceedings, but at a later stage, the Commission opted for an uniform requirement that notification to foreign creditors be made 'whenever' the law of the enacting State required notification to be given to all creditors. Such notification shall be made individually, unless the court deems that some other form of notification would be proper. Paragraph 2 also dispenses with the cumbersome and time-consuming formal procedures like, letters rogatory - used by many States to effect notification in a foreign jurisdiction. Paragraph 3 lays down the requirements of a notification of commencement of a proceeding, which shall (a) indicate the time and place for filing of claims; (b) indicate whether secured creditors need to file their secured claims; and (c) contain any other information, as required by the laws of the enacting State or the orders of the court.

Chapter III entitled 'Recognition of a Foreign Proceeding and Relief', (Articles 15 to 24) addresses itself to rules concerning recognition of a foreign proceeding in the enacting State and the nature and procedures towards the granting of relief, consequent to the recognition. Article 15 on 'Application for recognition of a foreign proceeding', lays down the rules regarding the application for recognition of a foreign proceeding. Paragraph 1 states that a foreign representative may apply to the court for recognition of the foreign proceeding in which he is appointed. The application for recognition shall be accompanied by: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or; (b) a certificate from the foreign court affirming the existence of the foreign proceeding and the

appointment of foreign representative. In the absence of such evidence stated in (a) and (b), any other evidence to that effect, which is acceptable to the court may be produced. A statement, identifying all foreign proceedings in respect of the debtor, as known to the foreign representative, shall also be attached. As regards the admissibility of these documents, Article 16 lays down a set of presumptions which acknowledge the authenticity of the documents, until proof to the contrary is produced.

Article 17 on 'Decision to recognise a foreign proceeding' elaborates the criteria for recognition of a foreign proceeding. Subject to the public policy exception provided for in Article 6, a foreign proceeding shall be recognised if: (a) it is a proceeding within the meaning of Article 2 (a); (b) the application has been submitted to the competent court; and (c) the application meets the requirements of Article 15(2). The foreign proceeding shall be recognized as a foreign main proceeding if it takes place in the State where the debtor has the centre of its main interests or as a foreign non-main proceeding, if the debtor has an 'establishment' within the meaning of Article 2(f). Such an application for recognition shall be decided upon at the earliest possible time. Further, the court retains the power to modify or terminate the recognition, if it is shown that the grounds for granting it were lacking or have ceased to exist.

Article 18 on 'Subsequent information', obligates the foreign representative, following the time of his filing the application for recognition, to promptly inform the court about: (i) any substantial change in the status of the recognized foreign proceeding or the foreign representative's appointment; and (ii) any other foreign proceeding regarding the same debtor, that becomes known to the foreign representative.

Article 19 on 'Relief that may be granted upon application for recognition of a foreign proceeding', provides that upon the request of a foreign representative, seeking relief urgently needed to protect the assets of the debtor or the interests of the creditor, the competent court may grant relief of a provisional nature. Such relief may be granted at any time after the filing of the application for recognition by the foreign representative and until the application is decided upon by the court. The grant of relief is discretionary and does not flow automatically from the presentation of an application. Following are the

various types of reliefs that can be granted

- (i) staying execution against the debtor's assets;

- (ii) entrusting the administration of the debtor's assets located in the enacting State to the foreign representative or any other person designated by the court;

- (iii) suspending the right to transfer, encumber or dispose of any assets of the debtor;

- (iv) providing for the examination of witnesses or taking of evidence concerning the debtor's assets or liabilities; and

- (v) any other additional relief as available under the laws of the enacting State.

Barring the exception under Article 21(1) (f) when the relief granted may be extended, the provisional relief generally terminates when the court decides on the application for recognition. Moreover, the court may refuse to grant relief under this provision if such relief would interfere with the administration of a foreign main proceeding.

Article 20 lays down the 'Effects of a foreign main proceeding'. Paragraph 1 describes the consequence of the recognition of a foreign main proceeding, as follows: (a) commencement or continuation of individual actions concerning the debtor's assets is stayed; (b) execution against the debtor's assets is stayed and; (c) suspension of the right to transfer, encumber or dispose of any assets of the debtor. It must be noted that, while the relief granted under Article 19 or 21 is subject to the discretion of the courts, the effects attendant upon recognition under this article are mandatory, i.e., they flow automatically from the fact of recognition of the main proceeding. However, the scope of the stay and suspension referred above, are subject to exception or limitation that might exist in the law of the enacting State. Paragraph 3 stipulates that, the staying of commencement or continuation of individual actions concerning the debtor's assets as provided in paragraph 1, does not affect the right to commence individual actions or proceedings, to the extent necessary

to preserve a claim against the debtor. This is intended to protect creditors from losing their claims because of a stay, pursuant to the recognition of a foreign main proceeding. Similarly the effects of recognition as enumerated in paragraph 1 does not bar the right of a creditor to request the commencement of a proceeding under the insolvency laws of the enacting State.

Article 21 enumerates the 'Relief that may be granted upon recognition of a foreign proceeding'. The court may, following the recognition of a foreign proceeding and upon the request of the foreign representative, grant any appropriate relief, including:

- (a) staying the commencement or continuation of individual actions concerning the assets of the debtor, to the extent they have not been stayed under Article 20(1)(a);
- (b) staying execution against the debtor's assets to the extent it has not been stayed under Article 20(1)(b);
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under Article 20(1)(c);
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets;
- (e) entrusting the administration or realisation of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
- (f) extending relief granted under Article 19(1); and
- (g) granting any additional relief available under the laws of the enacting State.

Paragraph 2 authorises the court, following a specific request from the foreign representative, to entrust the distribution of the debtor's assets

located in the enacting State to the foreign representative or another person designated by the court. Such action can be taken only after the court is satisfied that the interests of creditors in this State are adequately protected. In the event of granting relief to a representative of a foreign non-main proceeding, paragraph 3 requires that the court be satisfied that the relief relates to assets that, according to the laws of the enacting State, should be administered in the foreign non main proceeding or concerns information required in that proceeding.

Article 22 on 'Protection of creditors and other interested persons' enables the court to adopt the following measures: (a) The court may, at the request of a person affected by the relief granted under Article 19 or 21, or *suo motu*, modify or terminate such relief. (b) While doing so, the court must satisfy itself that the interests of the creditors and other interested persons, including the debtor are adequately protected. (c) To ensure this, the court may while granting relief impose such other conditions it deems appropriate. The power of the court to 'modify or terminate the relief is regulated by Article 20(2) which states that "the scope of relief granted is subject to the laws of the enacting State"'.

Article 23 titled 'Actions to avoid acts detrimental to creditors', provides that, upon recognition of a foreign proceeding, the foreign representative has "procedural standing" to initiate actions (also referred to as 'Paulian actions') to avoid or render ineffective, legal acts detrimental to the creditors. Strong opposition was expressed in the Working Group on the inclusion of this provision, as it had the potential of creating uncertainty about concluded or performed transactions, thus affecting third parties who in good faith, were unaware that a concluded transaction would be rendered ineffective. However, the provision was retained on the understanding that it only confers standing to bring actions for consideration and not to specify which law was applicable to a claim that a transaction should be avoided or rendered ineffective.

Article 24 on 'Intervention by a foreign representative' enables the foreign representative to intervene in any proceeding in which the debtor is a party, subject to other requirements of the laws of the enacting State are satisfied. Such a 'right to intervene' is intended to give the foreign representative standing

to appear in court and make representations in individual actions by the debtor against a third party or by a third party against the debtor.

Chapter-IV on "Co-operation with Foreign Courts and Foreign Representatives", consisting of Articles 25 to 27 lays down the legal basis for enabling court and other competent authorities in the enacting State to communicate directly with, or to request information or assistance from foreign courts or foreign representatives. A non-exhaustive list of the various modes of implementing the co-operation requirements, is also provided. Article 25 lays down a general rule and mandates the court to co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a person or body administering a reorganisation or liquidation under the law of the enacting State. More specifically, this provision empowers the court to communicate directly to request information or assistance directly from foreign courts or foreign representatives. It is interesting to note that in the discussion of the Working Group some States had expressed doubts as to whether a workable framework for judicial co-operation could be established exclusively by way of a national statute, since it was difficult to incorporate the concept of reciprocity in this Model Law. This view was not accepted, as the Commission felt that many States considered themselves to be in a position to provide a meaningful cross-border judicial co-operation in a national statute. To that extent, the Commission felt that Article 21 offered an opportunity for making the principle more concrete and adaptable to the particular circumstances of cross-border insolvency. In this context, it is worth recalling the conclusion reached by the Working Group at its earlier session "on the possibility of undertaking work towards model treaty provisions or a convention on judicial co-operation in cross-border insolvency, if the Commission at a later stage so decided"⁶.

Article 26 authorises a person or body administering a reorganisation or liquidation under the law of the enacting State, to cooperate to the maximum extent possible with foreign courts or foreign representatives. Such co-operation measures, in the discharge of its functions, shall be subject to the supervision of the court.

Article 27 on 'Forms of co-operation', enumerates the following means of implementing the obligation of judicial co-operation, as set out in Articles 25 and 26: (a) appointment of a person or body to act at the direction of the court; (b) communication of information by any means considered appropriate by the court; (c) co-ordination of the administration and supervision of the debtor's assets and affairs; (d) approval or implementation by courts of agreements concerning the co-ordination of proceedings; (e) co-ordination of concurrent proceedings regarding the same debtor; and (f) any other additional forms of co-operation as provided under the laws of the enacting State.

Chapter V dealing with 'Concurrent Proceedings' consists of Articles 28 to 32 deals with the commencement and co-ordination of concurrent proceedings in the enacting State against the debtor and also seeks to regulate the rate of payment to the creditors. Article 28 on 'Commencement of a Proceeding under the laws of the enacting State' provides that, upon recognition of a foreign proceeding, the court can open an insolvency proceeding against the same debtor, under the laws of the enacting State (hereinafter "local insolvency proceedings"), if the debtor has assets in that State. This is in line with the practice in many States. Article 28 also restricts the effects of that proceeding to (a) the assets of the debtor located in the enacting State; and (b) to other assets of the debtor, to the extent necessary to implement co-operation under Chapter IV. This provision is aimed at removing any jurisdictional obstacles for the foreign representative who believes that opening of an local insolvency proceeding is in the best interests of the creditors.

Article 29 lays down the rules for co-ordination of concurrent proceedings (local insolvency, proceeding and a foreign proceeding):

1. When a concurrent proceeding is taking place in the enacting State, the court shall seek co-operation under Chapter IV of this Model Law;
2. When a local insolvency proceeding is taking place at the time the application for recognition of the foreign proceeding is filed, then:
 - (a) any relief granted under Article 19 or 21 must be consistent with the

⁶ A/CN.9/433, paragraph 20.
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local insolvency proceeding; and

(b) if the foreign proceeding is recognised as a foreign main proceeding, the Article 20 does not apply.

3.. When a local insolvency proceeding commences after recognition or after the filing of the application of the foreign proceeding, then:

(a) any relief granted under Article 19 or 21 shall be reviewed, and if found to be inconsistent with the local proceeding - shall to that extent of inconsistency be modified or terminated;

(b) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in Article 20(1), shall to the extent of its inconsistency be modified or terminated.

4. In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

Article 30 covers the rules concerning the 'Co-ordination of more than one foreign Proceeding'. Besides reiterating the requirement of judicial co-operation as outlined in Chapter-IV, Article 30 directs the court that:

(a) following the recognition of a foreign main proceeding, any relief granted to a representative of a foreign non-main proceeding must be consistent with the foreign main proceeding.;

(b) if a foreign main proceeding is recognized after the recognition of a foreign non-main proceeding, then any relief granted under Article 19 or 21, to the extent of its inconsistency with the foreign main proceeding - shall be reviewed and accordingly be modified;

(c) wherein after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the court shall grant,

modify or terminate relief for the purpose of facilitating the co-ordination of proceedings.

Article 31 lays down the presumption that, in the absence of any other evidence, the fact of recognition of a foreign main proceeding, is proof of the debtor's insolvency for the purpose of commencing a local insolvency proceeding.

Article 32 lays down the 'Rule of payment in concurrent proceedings'. A creditor who had received part payment in respect of its claim in a foreign proceeding may not receive a payment for the same claim under a local insolvency proceeding, if the payment to other creditors of the same class is proportionately less than the payment already received by the creditor. This provision does not affect the ranking of claims under the laws of the enacting State, but is solely intended to establish the equal treatment of creditors of the same class.

Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency

The Commission had earlier decided to formulate a Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency. The proposed guide, which would contain background and explanatory information to the Model Law as a whole and to individual articles, is primarily intended to assisting States in enacting and applying the Model Law. At the current session, the Commission had before it the draft Guide prepared by the Secretariat (A/CN.9/436), but owing to paucity of time could not give active consideration to the subject. However, since much of the requisite material was to be found in the report of the current session and other *travaux préparatoires*, the Commission mandated the publication of the final version of the Guide to be prepared by the Secretariat together with the text of the Model Law, as a single document.

Adoption of the Model Law

At its meeting on 30 May 1997, the Commission finally adopted the

UNCITRAL Model Law on Cross-Border Insolvency. In adopting the Model Law, the Commission recommended "that all States review their national legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system, and that, in that review give favourable consideration to the UNCITRAL Model Law on Cross-Border Insolvency".

As to the future course of work on the topic, the Commission the proposal that it should prepare model provision for an international treaty, on judicial co-operation and assistance in cross-border insolvency. Besides, suggestions were made to explore the feasibility of work on various topics like: legislative treatment of cross-border insolvency in the banking and financial services sector, preparation of model agreement, for cross-border co-operation in reorganisations of insolvent enterprises, conflict-of-laws solutions in cross-border insolvency cases, and the effects of insolvency proceedings on arbitration agreements and arbitral proceedings. After discussion, the Commission decided that it would be preferable to evaluate the impact of the Model Law on Cross-Border Insolvency, before undertaking work towards a treaty or any other above mentioned topics. Towards this end, the Commission proposed that the Secretariat should collect information and monitor developing practices in the use of national laws based on the UNCITRAL Model Law.

The Sixth (Legal) Committee of the General Assembly, at its fifty-second session recommended all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency.

Comments

The significance of the Model Law lies in the fact, that it seeks to furnish the requisite statutory basis for the courts to communicate and request information or assistance directly from foreign courts or foreign representatives. Given the contemporary trends witnessing a growth in the volume of international trade and the liberalisation of national economies, such an

arrangement for enhanced 'judicial co-operation' could be deemed to be a *sine qua non* for ensuring greater legal certainty in trade and investments.

Apart from building on the existing practice, the Model Law embodies certain progressive elements like, dispensing with formal procedures of communication through letters rogatory and the legalisation of documents.

The importance of the Model Law is that it effectively consolidated and streamlines the existing State practice on the administration of foreign insolvency proceedings and the co-ordination of concurrent proceedings. Thus, it provides a single integrated framework, harmonising the diverse practices on the subject, thereby offsetting the difficulties faced by national jurisdiction in administering fragmentary and disparate elements of foreign insolvency laws. The fact that, the Model Law aims to provide only the skeletal framework containing the bare minimum requirements - offering sufficient room for the application of the national law - is evidence of the flexibility of the document.

III. Privately-Financed Infrastructure Projects : Preparation of a draft Legislative Guide

Background

Following the review of recommendations made by many States and a report by the Secretary-General containing information on work being undertaken by other organisations, the Commission at its twenty-ninth session in 1996, decided to prepare a 'Legislative Guide' on Build-Operate-Transfer (BOT) and related types of projects. Subsequently, the Commission requested the Secretariat to review issues for being dealt with in a legislative guide and to prepare draft materials to enable the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents. In response to this, the Secretariat submitted for the consideration of the Commission at the current session, a table of contents setting out the topics proposed to be covered by the legislative guide, followed by annotation concerning the issues suggested to be discussed therein). The Commission also had for consideration the initial drafts⁷ of Chapter I: Scope, Purpose and

Terminology of the Guide, Chapter II Parties and Phases of privately-financed infrastructure projects and Chapter V: Preparatory Measures.

In pursuance of the recommendation by the UNCITRAL Secretariat to the thirtieth session of the Commission, it was decided to henceforth use the words "privately-financed infrastructure projects" to refer to its work in this field, rather than the words "build-operate-transfer" (BOT) which had been so far used.

Privately -Financed Infrastructure Projects: Its Significance

In the case of privately financed infrastructure projects, the Government engages a private entity to develop, maintain and operate an infrastructural facility in exchange for the right to charge a price, whether to the public or to the government, for the use of the facility or the services or goods it generated. Such projects are considered to be significantly advantageous in two ways: (i) They would enable States to achieve substantial savings in public expenditure and to reallocate the resources that otherwise would have been invested in infrastructure in order to meet more pressing social needs; (ii) Since these projects are built and, during the concession period, operated by the project company, the State benefits from private sector expertise in operating and managing the relevant infrastructural facility.

As any successful implementation of privately-financed infrastructural project requires a favourable legal framework that fostered the confidence of potential investors, while protecting public interest. It is against this backdrop that the Commission mandated the Secretariat to review issues suitable for being dealt with in a legislative guide.

Structure of the draft legislative guide and issues to be covered

At the current session, the Commission engaged in a general discussion on the proposed structure of the draft legislative guides, as set out in the Secretariat document A/CN.9/438. It was noted that in dealing with individual

topics, the draft legislative guide should distinguish among the following categories of issues: general legal issues under the laws of the host country; issues relating to legislation specific to privately-financed infrastructure projects; issues that might be dealt with at the regulatory level; and issues of a contractual nature.

As a general comment on the subject matters to be covered by the draft legislative guide, the Commission observed that infrastructure projects increasingly involved the combined participation of public authorities and private sector entities - a development which needed to be adequately reflected in the Secretariat's future work. Furthermore, it was pointed out that the governmental decision to opt for private participation in infrastructure projects may be influenced by many factors, not limited to the objective of reducing public expenditure. It was noted that issues pertaining to privately-financed infrastructure projects also involved issues of market structure and market regulations. Hence, consideration of these issues is important for the treatment of a number of individual topics proposed to be covered by the guide. The Commission made several proposals as to the contents of the future chapters and requested the Secretariat to:

- (a) To elaborate in Chapter-III (General Legislative Considerations), on the different legal regimes governing the infrastructure in question, as well as on the services provided by the project company - issues in which there were significant differences among legal systems.
- (b) To emphasise in Chapter-VI (The Project Agreement), the obligations of the project company to transfer technology and also issues relating to competition policy;
- (c) To consider in Chapter-VII (Government support), possible ways in which privately-financed infrastructure projects could be facilitated with a minimum involvement of governmental guarantees;
- (d) To give particular attention in Chapter-XI (Expiry, Extension and Early Termination of the Project Agreement), to questions such as ownership of infrastructure and related properties; responsibility for 'dual liabilities of the

⁷ A/CN.9/438/Add. 1-3