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Consideration of issues in the area of insolvency law

Finalization and adoption of a model law on enterprise group insolvency

Compilation of comments on the draft model law on enterprise group insolvency as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-fourth session (A/CN.9/966)

Note by the Secretariat

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I. Introduction

1. Pursuant to the mandate given by the Commission to its Working Group V (Insolvency Law) to work on the topic of insolvency of enterprise groups,[1] the Working Group worked to develop a draft legislative text on that topic during a number of sessions. At its fifty-fourth session (Vienna, 10–14 December 2018), the Working Group completed that work by approving the text of the draft model law on enterprise group insolvency annexed to the report of that session and requesting the Secretariat to transmit that text to Member States for comment, before referring it to the Commission for consideration at its fifty-second session, in 2019 (A/CN.9/966, para. 110).

2. In January 2019, Governments and relevant international organizations invited to sessions of the Working Group were requested to submit comments on the draft model law on enterprise group insolvency, as approved by the Working Group at its fifty-fourth session.

3. The present document reproduces, in the chronological order, comments on the draft model law as received by the Secretariat, with formatting changes.

II. Compilation of comments

A. Governments

1. Ecuador

[Original: Spanish]
[26 February 2019]

The draft model law on enterprise group insolvency, which applies to enterprise groups where insolvency proceedings have commenced for one or more of the group's members, addresses the conduct and administration of those insolvency proceedings and cross-border cooperation between those insolvency proceedings.

- Appointment of a group representative

As defined in article 2(e) of the draft model law, "'Group representative' means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding."

In the two paragraphs of article 9 of the draft model law, the following is stated (underscoring added):

Cooperation and direct communication between a court of this State and other courts, insolvency representatives and any group representative appointed

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, other courts, insolvency representatives or any group representative appointed.

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

Lastly, article 16 of the draft model law provides as follows (underscoring added):

Authority to enter into agreements concerning the coordination of insolvency proceedings

An insolvency representative and any group representative appointed may enter into an agreement concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed.

While those three articles all refer to the appointment of a group representative, they do not identify the authority responsible for making that appointment. The Office of the Superintendent of Companies, Securities and Insurance is of the opinion that that information should be included in these articles, as occurs in article 19(1) of the draft model law.[1] Failing that, in order to provide greater clarity, the Office of the Superintendent suggests that a cross reference to article 19(1) be included in articles 2, 9 and 16.

- Difference between a group insolvency solution and insolvency proceedings

Article 2(f) of the draft model law defines a group insolvency solution as "a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members". In article 2(h) of the draft model law, it is stated that an insolvency proceeding means "a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation".

The Office of the Superintendent of Companies, Securities and Insurance suggests that the draft model law differentiate those two concepts in terms of their scope. To that end, a group insolvency solution could be defined as a procedure that assists debtors in discharging their obligations, normalizing their relationships with creditors and preserving the debtor company as a going concern, while an insolvency proceeding could be defined as a procedure aimed at realization of a debtor's assets in order to cover that debtor's liabilities through bankruptcy proceedings. If that distinction were drawn, it would be advisable to indicate that a group insolvency solution is intended ultimately as a means of avoiding insolvency proceedings. Accordingly, the commencement of a planning proceeding with a view to developing and implementing a group insolvency solution should preclude the commencement or continuation of insolvency proceedings. The Commission might wish to consider including a specific article along those lines in the draft model law.

It should be noted that the suggestion set out above is implicitly contained in article 20(f) of the draft model law. That article, which relates to the relief available to a domestic planning proceeding, establishes that, to the extent needed to preserve the possibility of developing or implementing a group insolvency solution, the competent court may, inter alia, stay "any insolvency proceeding concerning a participating enterprise group member". The same relief is provided for in article 22(c), which deals with the provisional relief that may be granted upon application for recognition of a foreign planning proceeding.

[1] That provision reads as follows (underscoring added): "**Article 19. Appointment of a group representative and authority to seek relief**. 1. When the requirements of article 2, subparagraphs (g)(i) and (ii) are met, the court may appoint a group representative. Upon that appointment, a group representative shall seek to develop and implement a group insolvency solution."

- Definition of the fiduciary duty of directors of enterprise group companies

Although this point has not been included in the draft model law, the report of the Working Group on the work of its fifty-fourth session (Vienna, 10–14 December 2018), states the following:

V. Obligations of directors of enterprise group companies

112. The Working Group agreed to make the following changes to document A/CN.9/WG.V/WP.153: … (g) In paragraph 11, to replace the first sentence with the following: "In determining the best interests of the directed group member, a director may weigh and consider various interests. These interests may also include the interests of other group members, or the group as a whole, where those interests are also consistent with the interests of the directed group member."

In that regard, the Office of the Superintendent submits that the Commission might wish to indicate that directors of enterprise group companies should act in such a way as to promote the success of the companies they represent for the benefit primarily of the shareholders; and that, in doing so, they may wish to take into account the positions of different stakeholders, such as other corporate members of the enterprise group. Accordingly, in the event of conflicts of interest between the shareholders in a company and other group members, directors should act in those shareholders' best interests, which take priority over the interests of the other stakeholders.

2. Bahrain

[Original: Arabic]
[14 March 2019]

…

In response to the call made by UNCITRAL for Member States to submit their comments on the draft model law on enterprise group insolvency, the Legal Department of the Council for Economic Development is pleased to present the following comments.

First, with regard to the definition of enterprise group, which is set out in article 2 of the draft model law:

Paragraph 2(b) defines an enterprise group as "two or more enterprises that are interconnected by control or significant ownership". This definition, in particular the words "control" and "significant ownership", presents certain difficulties and could result in the term being defined and applied in different ways, something that would not be conducive to international trade.

We therefore propose that "enterprise group" should be defined more precisely, in order to avoid differences in how it is applied or understood. The definition should include the concepts of subsidiary enterprises and parent enterprises. An enterprise should be considered a subsidiary if it is controlled directly or indirectly by a parent enterprise as a result of the parent enterprise holding more than half of the subsidiary's capital, or because the parent enterprise has the right to or owns a number of shares that enables it to control decision-making or the composition of the board of directors or to appoint the director.

Second, in paragraph 12.1, it is stated that a group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and [foreign] [insolvency] representatives of [other] enterprise group members to facilitate the development and implementation of a group insolvency solution.

According to the language of the paragraph, the purpose of cooperation is simply to "facilitate the development and implementation of a group insolvency solution". It would be better to broaden the scope of the purpose to address such issues as the management of cross-border insolvencies in a fair and effective manner, so as to protect the interests of all creditors; cooperation in protecting the overall combined value of the operations and assets of enterprise group members affected by the insolvency; cooperation in the rescue of financially troubled enterprise groups; and other purposes set out in the draft model law.

Third, paragraphs 1 and 2 of article 17 provide that an enterprise group member whose centre of main interests is located in another State may participate in the insolvency proceeding for the purpose of facilitating cooperation and coordination, including developing and implementing a group insolvency solution.

We suggest that article 17 should include a provision that an enterprise group member has the right to receive information about a insolvency proceeding provided that the enterprise group member informs the competent court of the State in which the insolvency proceeding is occurring of its desire to participate therein. Such a provision would ensure the effectiveness of insolvency proceedings and ensure the right of members of an enterprise group to participate therein.

Fourth, article 19, on relief available to a planning proceeding, addresses the relief measures a court may grant at the request of the group representative, such as staying execution against the assets of the enterprise group member, suspending the right to transfer any of those assets, staying the commencement or continuation of individual actions and so forth. We propose the addition of a new paragraph to the article extending the stay or suspension to include the limitation period, so that the stay or suspension of any process or procedure under article 19 covers the period in which that process or procedure must take place according to the provisions of a law or an agreement. If the laws of a State require that proceedings be instituted within a certain period, but creditors are unable to do so because of a stay, the stay should apply also to the limitation period, not just the stay of proceedings. The article could be worded as follows:

> If a person is prohibited by the moratorium set forth in this article from taking action against the debtor or the insolvency estate, which action must be taken within a specified time period under applicable law or an agreement, then the running of the time period for the taking of such action shall be automatically suspended for the period while the moratorium is in effect.

3. Switzerland

[Original: English]
[15 March 2019]

Note 76 of the Report (A/CN.9/966) of WG V cites concerns of a delegation about "including draft articles 29 to 31 as supplemental provisions" – a concern that "involved a query regarding the objectives and reasons for presenting the provisions as supplemental". The Swiss delegation welcomes the approach taken by WG V to divide the draft model law in a "core" and "supplemental" provision, while it acknowledges the legitimacy of any request for explanations for the choice of such an approach. In response to that request, the Report recalls the "discussion of the same issues at earlier sessions of the Working Group". It rightly also notes that "paragraphs 25, 26, 205 and 206 of the draft guide explained the reasons for the approach taken with respect to articles 29 to 31".

While this delegation considers these explanations to be sufficient – and essential – in the context of the explanatory report, additional information on the background on the "core" and "supplemental" provision may be of assistance to the commission, although it may not be necessary to have it included in the guide: According to the recollection of this delegation, which has been present on this project since its very beginning, there has been a fundamental lack of consensus in respect of

provisions that would depart from the principle of the centre of main interest (COMI) of a company as the main (and sole) criterion for the opening and conduct of insolvency proceedings over a company (even as part of a group). The proposals now contained in the "supplemental" provisions contain – in the view of at least this delegation – an exception to the COMI-principle that would not be justified even in the context of a group insolvency.

In the view of this delegation, the possible advantages of jurisdictional flexibility in the administration of an insolvency do not outweigh the damage that legal uncertainty as to the insolvency forum and, as a consequence, the lex fori concursus causes in contractual and financial relationships of group members outside the insolvency context. A number of delegations, including the Swiss delegation, were of the view that those reservations should not necessarily stand in the way of a more flexible approach of jurisdictional criteria, particularly where such flexibility was deemed to serve a more effective administration of an insolvency. This approach of permitting some states to stick to their basic principles (i.e. implementing only the "core" provision") while not precluding others from implementing alternative approaches ("the supplemental" provisions) was at the origin of the compromise that led to the current structure of the model law of "core" and "supplemental" provisions. This concept ultimately built the basis for a general compromise to continue the work on this project and has ultimately brought the draft model law to where it is.

To sum up, while one could discuss the necessity of a separate title on "core" provisions, this delegation considers it to be an absolutely necessary element of the model law that recommendations 30–32 are kept under the title "supplemental provisions" (or "Optional provisions") and the paragraphs cited above (25, 26, 205 and 206) are retained unaltered in the explanatory report.

B. Intergovernmental organizations

1. International Monetary Fund (IMF)

[Original: English]
[15 March 2019]

We congratulate UNCITRAL on the excellent work done by Working Group V on the draft Model Law on Enterprise Group Law. The insolvency of enterprise groups is a complex legal area, with important implications for international trade and the global economy. Since enterprise groups represent the prevalent corporate structure for the conduct of international businesses nowadays, there is a clear need for frameworks that facilitate the cooperation to the maximum extent possible among different insolvency proceedings affecting enterprises of the same group. Flexible cooperation arrangements are instrumental in finding group-wide solutions that deliver the most efficient economic outcomes, helping preserve jobs, enterprise value and financial stability. However, cooperation mechanisms can only succeed where there is an enabling legislative framework that provides technical solutions to the numerous challenges of enterprise group insolvency. UNCITRAL has addressed this need through the development of this draft Model Law.

The draft Model Law builds on the extensive guidance already produced by UNCITRAL on the insolvency of enterprise groups (Legislative Guide, Part three, 2010), and provides more specificity to those recommendations by arranging them within an organized statutory framework that will be extremely helpful for states considering reforms in this area. We understand that Working Group V has held extensive discussions over the provisions of the draft Model Law, and the high quality of its provisions and of the comments in the Guide to Enactment reflect the outstanding efforts of the members and the secretariat in producing this text.

At this late stage of the process, we want to congratulate UNCITRAL on the imminent completion of this project. We just have the following technical comments for UNCITRAL's consideration:

-**Title of the draft Model Law**: The proposed title is “Model Law on Enterprise Group Insolvency”. We understand that the general reference to “enterprise group insolvency” is based on the fact that some of the provisions in the draft Model Law (especially, some articles in chapter 3) can also apply to domestic enterprise groups. However, the draft Model Law clearly concentrates on cross-border insolvency, and even the preamble states that: “the purpose of this Law is to provide mechanisms to address cases of *cross-border insolvency* affecting the members of an enterprise group […]”. UNCITRAL may want to reconsider the title for the draft Model Law; or harmonize the contents of some of the provisions to avoid any confusion as to the scope of the draft Model Law.

-**Definition of enterprise group (Art. 2(b))**: The draft Model Law takes the definition of enterprise group that was already included in the Legislative Guide. According to article 2(b), “*Enterprise group means two or more enterprises that are interconnected by control or significant ownership*”. The definition of control also follows the Legislative Guide (“*Control means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise*”).

These definitions reflect the discussions at the Working Group during the elaboration of the Legislative Guide: however, a legal text has a different standard for precision and clarity of its definitions, and the concept of enterprise group included in the draft Model Law is generic and could create uncertainty and litigation. The definition of enterprise group is based on a generally accepted of control, but at the same time it proposes an open-ended alternative, “significant ownership”, that is not defined in the draft Model Law, and that can be interpreted in very different ways, with contradictory results.

As the definition of enterprise group tends to be connected with other areas of domestic law (insolvency law, but also corporate law, accounting law, or even tax or labour laws), it would be preferable that states align the definition of enterprise group with the concepts they already use in domestic legislation, leaving this definition in brackets in the draft Model Law, and providing advice in the Guide to Enactment on the need to include a definition of enterprise group in the legislation adapting the draft Model Law – or to refer to an existing definition already existing in domestic law –, and its consequences.

-**Treatment of foreign claims in the insolvency of enterprise group members (Arts. 27 and 29).** The draft Model Law incorporates rules in line with practices developed in some countries to facilitate insolvency proceedings and protect foreign creditors (the so-called “synthetic insolvency procedures”). For instance, creditors may refrain from requesting the commencement of insolvency proceedings abroad when there is a commitment that they will receive an equivalent treatment in the insolvency proceedings already commenced in the enacting State. Leaving aside the technical aspects of these provisions, the critical issue is that these provisions seem even more important for the insolvency of individual enterprises with multiple establishments than for enterprises that are members of an enterprise group (statements in paras. 190 and 196 of the Guide to Enactment recognize this, at least partially). The question then becomes why these provisions would apply only to the insolvency of enterprise group members and not to individual enterprises (compare, for instance, the treatment of this question in art. 36 of the European Insolvency Regulation).

Conversely, the Model Law on Cross-Border Insolvency of 1997 includes a rule for payment in concurrent proceedings (art. 32, the so-called “hotchpot rule”), which would deserve to be applied and adapted to situations that arise in the context of the insolvency of enterprises belonging to a group. For example, it is frequent that in the insolvency of enterprise groups, creditors hold claims against the parent or a subsidiary of the group that are guaranteed by other members of the group. For this reason, coordination of payments is extremely important, and its application should be extended to the insolvency of enterprises that belong to a group.

At this stage, the Guide to Enactment could consider the inclusion of a reference to the extension of articles 27 and 29 of the draft Model Law to the insolvency of single enterprises, as regulated by the 1997 Model Law; and it could also consider the inclusion of a reference to the extension of Art. 32 of the 1997 Model Law to the insolvency of enterprise groups.

C. International non-governmental organizations

1. European Law Institute

[Original: English]
[18 March 2019]

This report (Report) contains comments on individual provisions of the Draft model law on enterprise group insolvency ('Model Law'), as well as certain provisions of the Enterprise group insolvency guide to enactment of the draft model law ('Guide'), prepared by the Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL). Our comments are based on the analysis of the following documents:

1. Draft model law on enterprise group insolvency, as contained in the Annex to the Report of Working Group V (Insolvency Law) on the work of its fifty-fourth session (Vienna, 10–14 December 2018);[1]

2. Enterprise group insolvency guide to enactment of the draft model law (as contained in A/CN.9/WG.V/WP.161), 20 September 2018.[2]

The order of commentaries is based on the numbering of articles in the Model Law and the Guide and does not represent or signify the importance of a particular commentary or amendment to the Model Law or the Guide suggested in this Report.

Article 2(g). Definitions ("planning proceeding")

1. "Planning proceeding" is a new term in the global world of restructuring and insolvency. The Model Law introduces the term with the intention to facilitate group insolvency solutions. We understand that over several meetings of the Working Group V the definition and the mode of operation of planning proceedings have been widely discussed. The Guide explains in paragraph 41 that a planning proceeding is a main proceeding commenced in respect of an enterprise group member. Two questions arise out of it in our view: 1. What is the nature of the relation between main proceedings and planning proceedings, i.e. do these proceedings coincide or are they separate (distinguishable)?; 2. Will group coordination proceedings, introduced in the European Insolvency Regulation (EIR Recast)[3] and opened under this EU regime be recognisable under the Model Law?

To address these questions, two alternative approaches are possible:

Alternative 1. Group coordination proceedings fall under the definition of planning proceedings

In order to align the concept of "planning proceeding" with that of "group coordination proceedings" under the EIR Recast, and to make sure that the latter is recognizable under the Model Law, the definition of "planning proceeding" in the Model Law needs to be more flexible. In particular, the Model law and its

[1] To avoid confusion, the text of the Draft model law on enterprise group insolvency is published on 20 December 2018 (in the Annex to A/CN.9/966), replacing the draft published on 18 September 2018 (A/CN.9/WG.V/WP.161).

[2] We understand that the Guide has not been updated in line with the most recent version of the Model Law. Nevertheless, we have used the Guide as a clarification tool, when interpreting the provisions of the Model Law, and have made a few suggestions on how to improve it, unless such improvements have already been agreed by the Working Group V.

[3] Regulation (EU) 2015/848 of the European parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

Guide should allow this "planning proceeding" to derive from court decisions in both main and non-main proceedings. This approach reflects the fact that under the EIR Recast, group coordination proceedings is a separate procedure distinct from main/non-main (secondary) insolvency proceedings, which includes the appointment of a group coordinator who acts independently from the insolvency representatives of enterprise group members.

Following this approach, article 2(g) would need to cover also those cases in which the court in a non-main proceeding of an enterprise group member initiates planning proceedings (currently, art. 2(g)(i)–(ii) refers only to main proceeding). This would not require the removal of the reference to subparagraphs (i) to (iii) in the second sentence of article 2(g), but it would mean to include also non-main proceedings in the text as recommended below. We are aware that the respective provisions have been created for situations in which a planning proceeding is contemplated in the main proceedings. We are certain, however, that the Model Law should also cover group coordination proceedings opened by a court in a secondary (non-main) proceeding. For the avoidance of any doubt, the respective clarification may also be included in the Guide, confirming that group coordination proceedings under the EIR Recast may be recognized as planning proceedings, provided that they satisfy the criteria of article 2(g) (i)–(iii) of the Model Law.

In our view, article 2(g) is better placed in a separate article (outside art. 2 "Definitions") for at least two reasons. The first reason relates to the fact that article 2(g) exceeds the boundaries of a definition and essentially deals with (criteria for) the opening of planning proceedings. The second reason refers to the complexity of article 2(g) itself. It may be advisable to place the rules on planning proceedings, including requirements for their opening, in a new set of articles or a new chapter (see Recommendation 7 below).

This first approach leads to the following recommendation:

Recommendation 1.1

- Move article 2(g) to article 19, or allocate the rules on planning proceedings, including requirements for their opening, in a new set of articles or a new chapter (see Recommendation 7 below).
- Reformulate the second sentence in article 2(g) to read as follows:

"With respect to the requirements of subparagraphs (g)(i) to (iii), the court may also recognize as a planning proceeding any proceeding that has been approved by a court with jurisdiction over a main or non-main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this Law."

Alternative 2. Differentiation of proceedings covered by the Model Law

As explained above, the Model Law is not clear when it comes to the nature of planning proceedings and their compatibility with group coordination proceedings, opened pursuant to the EIR Recast. Under Alternative 1 above, we suggested a broad interpretation of the "planning proceeding" with the aim to cover various proceedings having the goal of reaching a group insolvency solution.

Another option, Alternative 2, is based on the notion to structurally differentiate between procedures aiming at a group-wide binding/non-binding plan (planning proceedings) and coordination instruments including coordination proceedings (which may or may not lead to such a plan). As a result, group coordination proceedings will fall into the subset of coordination proceedings, recognisable under the Model Law.

This second approach leads to the following recommendation:

Recommendation 1.2. Introduce differentiation of proceedings covered by the Model Law and include new rules on planning proceedings and coordination proceedings in separate articles of the Model Law.

Article 4. Jurisdiction of the enacting State

2. Article 4 is intended to clarify the scope of the Model Law. It states that where an enterprise group member has the centre of its main interests (COMI) in the enacting state, the Model Law does not limit the jurisdiction of the courts of that state with respect to the enterprise group member concerned. In order to encourage and promote group insolvency solutions, it may be advisable to stress that the Model Law does not restrict the jurisdiction of the court in the enacting state to jointly open insolvency proceedings for several enterprise group members, provided that the COMI of each of those enterprise group members is located in the jurisdiction of that court.

A similar rule is present in Recital 53 of the EIR Recast and Recommendation 9.05 of the Instrument of the European Law Institute "Rescue of Business in Insolvency Law" (ELI Report).[4]

Recommendation 2. Add to article 4 of the Model Law the following provision: "Nothing in this Law is intended to restrict the jurisdiction of the courts of this State to jointly open insolvency proceedings for several enterprise group members, provided that the COMI of those enterprise group members is located in the jurisdiction of those courts."

Chapter 2. Cooperation and coordination

3. Chapter 2 of the Model Law on cooperation and coordination contains articles 9–18. We adhere to the view that effective cooperation and coordination between proceedings opened against different enterprise group members is key to facilitating efficient administration of cross-border insolvency and prompt adoption of group insolvency solutions. Recent years have witnessed the rise of multiple initiatives aimed at improving cooperation and communication in international insolvencies. Paragraph 66 of the Guide endorses international guidelines that have been developed to assist the conduct of cross-border cooperation and coordination in insolvency cases. It provides one example of such guidelines, namely the guidelines developed by the Judicial Insolvency Network (JIN Guidelines), which address numerous issues relevant in the context of Chapter 2. Evidently, the JIN Guidelines mainly apply in the circle of 'common law' jurisdictions. We believe that in order to make the Guide more informative and balanced, reference to other guidelines and initiatives should be mentioned. In particular, the following instruments are, in our opinion, worth mentioning: the European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007; a revision is due in 2019), ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (updated version from 2012) and the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (2014).

Recommendation 3. In addition to JIN Guidelines, add in the Guide references to European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007; a revision is due in 2019), ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2012), EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (2014).

[4] Bob Wessels & Stephan Madaus, Rescue of Business in Insolvency Law – an Instrument of the European Law Institute (September 6, 2017). Available at https://www.europeanlawinstitute.eu/projects-publications/completed-projects/insolvency/ and at SSRN: https://ssrn.com/abstract=3032309.

Article 17. Appointment of a single or the same insolvency representative

4. Article 17 of the Model Law provides for the possibility of appointing a single or the same insolvency representative for different enterprise group members.[5] It can be suggested to add that such an appointment should be compatible with the rules applicable to each of the proceedings concerned, in particular with any requirements on the qualification and licensing of the insolvency representative and the rules concerning conflicts of interest. Despite the fact that similar clarifications are given in paragraphs 97 and 102 of the Guide, including these in the main text seems justifiable, as the problems arising from the appointment of the same insolvency representative (e.g. actual or perceived conflicts of interest) can be particularly pressing in a situation of the enterprise group. The analogous limitations can be found in Recital 50 of the EIR Recast and Principle 17 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (as applied to an intermediary appointed by the court).

Recommendation 4. Add to article 17 of the Model Law the following provision: "Such an appointment should be compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency representative and the rules concerning conflicts of interest."

Article 18. Participation by enterprise group members in an insolvency proceeding commenced in this State

5. Article 18 of the Model Law deals with participation by the enterprise group members in an insolvency proceeding commenced in the enacting state. However, there is uncertainty as to which type of proceeding article 18 refers to, namely to main insolvency proceeding (art. 2(j) Model Law), non-main proceedings (art. 2(k) Model Law) or planning proceeding (art. 2(g) Model Law). The Guide in paragraph 43 refers to "planning proceedings" only, but in paragraphs 103–111 it seems to refer to main/non-main proceeding only, as defined in article 2(j) and article 2(k) of the Model Law. Literal reading of article 18 of the Model Law supports the latter interpretation. However, in such a case the rights of enterprise group members related to participation in the planning proceedings become unaddressed.

Recommendation 5. Clarify that article 18 of the Model Law applies to main, non-main and planning proceedings. Alternatively, as suggested below (see Recommendation 7), the rights concerning conduct and participation in the planning proceedings can be separately addressed in different article(s) or a new chapter.

Article 18. Participation by enterprise group members in an insolvency proceeding commenced in this State

6. Article 18 of the Model Law gives enterprise group members the right to participate in insolvency proceedings opened against another enterprise group member. This right is given, once the insolvency proceedings against the latter group member have been opened ("if an insolvency proceeding has commenced", see article 18(1)). We believe that this right should extend to the period prior to the opening of the insolvency proceedings, when the insolvency application against the group member is still pending. This extension in time could improve the chances of reconciling various insolvency proceedings and, ultimately, achieving a group insolvency solution. Otherwise, different proceedings may end up having different goals (e.g. liquidation v. reorganization). This is why, for example, the EIR Recast empowers (obliges) insolvency practitioners appointed in insolvency proceedings concerning a member of a group of companies to cooperate and communicate with any court before which a request for the opening of proceedings in respect of another member of the same group of companies is pending (see art. 58 EIR Recast). In our

[5] As per para. 101 of the Guide, the insolvency representative might also be a debtor-in-possession.

opinion, the extension of participation rights in time to cover the period, when a request to open insolvency proceedings is pending, will facilitate the coordination of proceedings opened against different enterprise group members.

Recommendation 6. Extend the period, in which enterprise group members can participate in insolvency proceedings of another group member, to the time after the insolvency application against the latter has been filed, thus, prior to the commencement of its insolvency proceedings. Such participation may be subject to showing by the enterprise group members a legitimate interest in such participation.

Planning proceedings regulated in several places in the Model Law

7. We believe that the Model Law lacks clarity with regards to the opening, scope and effects of planning proceedings. This should be addressed, keeping in mind the importance (centrality) of this instrument in the framework of the Model Law. The rules on such proceedings are scattered throughout the Model Law (art. 2(g), art. 18 (debatable), art. 19(3), art. 20, etc.) and as indicated above, it is not always clear whether a particular rule relates to "regular" insolvency proceedings or to planning proceedings. The distinction between planning proceedings and main/non-main proceedings is expressly envisioned in the rules on the opening (art. 2(g)) and recognition (Chapter 4) of the planning proceedings. We believe that adding a set of articles, placed before article 19 of the Model Law, describing the opening, nature, scope and effects of planning proceedings, will present a clear overall picture, and therefore bring transparency and will make the application of the Model Law more predictable and consistent among different states. It can also be a good option to add a separate chapter, preceding current Chapter 3 and dealing exclusively with the issues concerning the opening and conduct of planning proceedings.

Recommendation 7. Add a set of articles or (preferably) a separate chapter, preceding current Chapter 3, summarizing in one place the rules on the opening, participation, scope and effects of the planning proceedings. The new chapter can be titled "Opening and conduct of a planning proceeding in this State". This chapter can include the provisions covering:

(a) The jurisdiction for the opening of planning proceedings (current art. 2(g) of the Model Law and para. 42 of the Guide);

(b) Voluntary character of participation in planning proceedings and the opt-in principle (art. 18, para. 43 of the Guide);

(c) Participation in planning proceedings of non-insolvent enterprise group members (para. 43 of the Guide);

(d) The rule, according to which the court with jurisdiction to open planning proceedings should not refuse to do so, unless the opening of planning proceedings does not facilitate the effective administration of the insolvency proceedings relating to the different enterprise group members or if the opening of such proceedings harms interests of creditors of any participating enterprise group member.[6]

Article 19. Appointment of a group representative and authority to seek relief

8. The current title of Chapter 3 ("Relief available in a planning proceeding in this State") does not precisely reflect its content. For instance, the appointment of a group representative, referred to in article 19 of the Model Law, cannot be considered a relief in itself. In light of this, and for the avoidance of any potential confusion, we suggest that article 19 should be removed from current Chapter 3 and instead placed in the new Chapter "Opening and conduct of a planning proceeding in this State", as suggested in Recommendation 7 above, or in Chapter 2 following article 18.

[6] Inclusion of point (d) in the Model Law should restrict the grounds for refusal of the opening of planning proceedings and thus make the adoption of such proceedings more likely. At the same time, the flexibility in the adoption of planning proceedings is preserved.

Recommendation 8. Remove article 19 from Chapter 3 and place it in a new Chapter "Opening and conduct of a planning proceeding in this State", as suggested in Recommendation 7, or in Chapter 2 following article 18.

Article 19. Appointment of a group representative and authority to seek relief

9. In paragraphs 38 and 115 of the Guide, it is stated that the main insolvency representative can later become a group representative. This is not advisable, as we feel that overlapping roles (i.e. insolvency representative in one enterprise group member and group representative for the whole/part of the enterprise group) will add confusion and may undermine trust in such a figure by participating enterprise group members. The Guide also recognizes that the tasks to be undertaken by the insolvency representative with respect to the main proceeding and by the group representative with respect to the planning proceeding might differ (see para. 116).[7] The advocated separation of roles is necessary to ensure independence and impartiality of a group representative.[8] For this reason, for example, article 71(2) EIR Recast states that "[t]he coordinator shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members."[9] We argue that a similar provision can be added in the Model Law, possibly as an option (addition) to the existing rules.

Recommendation 9. Include an option for the enacting states to incorporate in article 19 of the Model Law the following provision: "The group representative shall not be one of the insolvency practitioners appointed to act in respect of any of the enterprise group members, and shall have no conflict of interest in respect of the enterprise group members, their creditors and the insolvency representatives appointed in respect of any of the enterprise group members."

Paragraph 41 of the Guide. Number of planning proceedings

10. The Model Law remains silent as to how many planning proceedings can be opened for one enterprise group and it does not hint on any order of priorities for the opening of planning proceedings with regard to the same enterprise group, covering several jurisdictions at the same time. Paragraph 41 of the Guide clarifies in this respect that "[i]t is not intended that there could be only one planning proceeding in an insolvency concerning an enterprise group." In our opinion, multiplicity of planning proceedings and absence of rules on relations between them may reduce their utility. This is particularly the case where several planning proceedings overlap and replicate each other. To mitigate the negative consequences of this, the Guide may clarify that where a planning proceeding has already been initiated, another planning proceeding can be opened with respect to the same enterprise group, provided that it is efficient and otherwise justified. For example, the utility of several planning proceedings may arise from the complexity and geographical extension of enterprise groups (i.e. planning proceeding covering United States of America/Canada, planning proceedings covering EMEA, etc.).

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[7] The difference in the functions and goals pursued by insolvency representatives and a group representative follows from article 22(1)(e) of the Model Law, which entrusts the administration or realization of perishable assets first to the (local) insolvency representative, and only if this option is unavailable, the group representative may be entrusted with that task. As explained by the Guide, entrusting such task to the group representative "may give rise to concerns that since that position does not represent any particular estate, there are no assets that could afford some protection in the event of losses sustained through the actions of the group representative" (see para. 152).

[8] The combination of two roles may also complicate the position of the court in ensuring impartiality and independence of a group representative.

[9] The importance of independence of a coordinating party is also found in German rules on group coordination proceedings, which provide for the appointment of co-ordination administrator (*Verfahrenskoordinator*) who must be independent from all appointed insolvency administrators, debtors (bankrupt corporate group entities) and creditors of the corporate group entities. See § 269e of German Insolvency Code (InsO).

Recommendation 10. Add to Art. 2(g) of the Model Law, or the new chapter (see Recommendation 7 above), or the Guide in paragraph 41, a clarification that "where a planning proceeding has already been initiated with respect to an enterprise group, another planning proceeding can be opened with respect to the same enterprise group, provided that it is efficient and otherwise justified. The burden of proving the latter rests with the enterprise group member requesting the opening of new planning proceeding."

Article 20. Relief available to a planning proceeding

11. Article 20 of the Model Law addresses the relief available to a planning proceeding taking place in the enacting state. Among the different types of relief, it lists "staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member" (art. 20(1)(c) Model Law). In our opinion, this relief is formulated too broadly, to the extent that it covers both the actions filed by the enterprise group member (e.g. against its third parties-debtors) and actions filed against the enterprise group member, regardless of whether the action is pending or is yet to be commenced. We do not see sufficiently convincing arguments to restrict the former, particularly in a situation where the action is pending at the time when the insolvency proceeding is initiated. Such interference may disturb parties' expectations and lead to increased costs of re-litigating the same matter. In other words, the disturbance caused may not be necessary for an orderly and fair conduct of a cross-border insolvency. The Guide seems to acknowledge the limited practical relevance of implementing the automatic stay of arbitral proceedings, which may be subject to another law (lex arbitri) (see para. 125). The restricted effect of the insolvency proceedings on pending lawsuits or arbitral proceedings is also embraced in article 18 of the EIR Recast.

Recommendation 11. We suggest the following reading of article 20(1)(c) of the Model Law: "Staying the commencement or continuation of individual actions or individual proceedings against the enterprise group member concerning its assets, rights, obligations or liabilities."[10]

Article 28. Undertaking on the treatment of foreign claims: non-main proceedings

12. Article 28 of the Model Law introduces the concept of "synthetic" proceedings. According to this article, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another state may be treated in a main proceeding commenced in the enacting state in accordance with the treatment such a claim would be accorded in the non-main proceeding. This is based on the undertaking (promise) given in the main proceeding and approved by the court in those proceedings. In return, non-main proceedings are avoided (excluded). The ratio is that this ultimately facilitates the centralized treatment of claims in an enterprise group insolvency (see para. 194 of the Guide).

It may be noted that the tool of "synthetic" proceedings applies to each enterprise group member individually. In other words, main and non-main proceedings (which are avoided), referred to in article 28, relate to one and the same legal entity and not to several legal entities. This does not undermine the utility of "synthetic" proceedings in a group context. But the understanding that the concept of synthetic proceedings applies to each enterprise group member separately, is crucial. In this respect, the clarification given in paragraph 24 of the Guide that "Chapter 5 permits the claims of an enterprise group member located in one jurisdiction (a non-main jurisdiction) to be treated in a main proceeding concerning another group member taking place in another jurisdiction in accordance with the law applicable to those claims" may benefit from an amendment.

[10] This recommendation equally applies to article 22(1)(d) and article 24(1)(e) of the Model Law.

Recommendation 12. Revise paragraph 24 of the Guide to highlight that the undertaking referred to in article 28 of the Model Law applies to claims of the same enterprise group member.

Article 28. Undertaking on the treatment of foreign claims: non-main proceedings

13. Article 28 of the Model Law provides that an undertaking may entail a guarantee that a claim that could be brought in non-main proceedings will be treated in main proceedings in accordance with the treatment it would have received in the non-main proceedings, without the actual opening of the latter. From the text of the article it is not clear what is meant by "treated […] in accordance with the treatment". Paragraph 196 of the Guide gives the following example: "a claim that could be brought in a non-main proceeding in one State relating to a group member that is subject to a main proceeding in the enacting State could be treated in that main proceeding in accordance with the law applicable to the claim."

We believe that reference to the law of the claim for the purposes of determining "treatment" in the sense of article 28 is unfortunate. Law applicable to claims can, in principle, be freely chosen by the parties[11] and may in itself have no connection to the debtor, the creditor or the main or non-main insolvency forum. Besides, applying dozens or even hundreds of different laws (depending on the number of claims, which, importantly, is not limited or otherwise regulated by the Model Law) may not be economical or realistic. Instead, we suggest that the guiding law for the treatment of creditors in the case of "synthetic" (avoided) proceedings should be the domestic law of potential (avoided) non-main proceedings (avoided lex concursus secundarii). The same approach is adopted in article 36(1) of the EIR Recast. Any foreign law governing the debt affected in insolvency proceedings would only be relevant if the (avoided) lex fori concursus secondarii requires it, or if the law governing the debt requires local debt restructuring proceedings for any amendment (e.g. the English Gibbs rule).

The question may arise to what extent the treatment under the law of the avoided non-main proceeding should govern the distribution to the creditors who could have brought claims in such non-main proceeding. Neither article 28 of the Model Law nor paragraphs 194–201 of the Guide provide a clear answer. In this respect, we believe that article 28 should make it clear that the insolvency representative in the main insolvency proceedings (alone or together with the group representative under article 28(1)(a) of the Model Law) may give an undertaking in respect of the assets located in the state in which the non-main insolvency proceedings could be opened. Thus, when distributing those assets or the proceeds received as a result of their realization, s/he will comply with the distribution and priority rights under the domestic law of the avoided non-main proceeding. This approach is in line with the territorial scope of non-main insolvency proceedings and can also be found in article 36(1) of the EIR Recast.

Recommendation 13. Amend article 28 of the Model Law to include the following provisions:

(i) Undertaking is given in respect of the assets of the enterprise group member, which are located in the state in which non-main insolvency proceedings could be opened; and in such case

(ii) The distribution of those assets or the proceeds received as a result of their realisation should comply with the distribution and priority rights under domestic law that creditors would have if non-main proceedings were opened in that state.

[11] However, the enforceability of claims and security rights may be subject to domestic (mandatory) laws, which sometimes embed international conventions.

Article 29. Powers of the court of this State with respect to an undertaking under Article 28

14. Article 29 of the Model Law addresses the powers of the court in the enacting state in case of an undertaking originating from a different state. According to this article, the court may approve the treatment to be provided in the foreign main proceedings to the claims of creditors located in this State. Confusion may arise as to what is meant by "claims of creditors located in this State." This can refer to: 1. Location of the claims, 2. Location of the creditors with claims. In the first scenario, determining the place of the claim may be rather problematic, particularly taking into account the fact that the Model Law does not contain any provisions on this matter and the global harmonization of private international law rules addressing this issue is not foreseeable in the nearest future. As to the second scenario, article 28 does not make any reference to the location of creditors, instead referring to all claims that could be brought in the non-main proceedings, irrespective of where the creditor holding such claims is located. Besides, restricting the application of article 29 to e.g. local creditors only, may violate the pari passu principle.

Recommendation 14. To align article 29 with article 28, the former may read as follows:

"[…] a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceedings to the claims that could be brought by a creditor of the enterprise group member in this State;"

Article 30. Undertaking on the treatment of foreign claims: main proceedings

15. Article 30 of the Model Law is located in the supplemental provisions (Part B). It essentially develops the ideas and mechanisms of article 28 and provides that an undertaking may be given in the non-main proceedings to avoid the opening of main or other non-main proceedings. However, paragraph 207 of the Guide creates confusion when it states that this article permits treatment of a claim in a proceeding in the enacting state, "irrespective of whether that proceeding is a main [our underlining; reporters] or non-main proceeding." We believe that if the proceeding from which the undertaking originates is the main proceeding, article 28 should apply and not article 30, as stated in the cited provision of the Guide.

Two other remarks relate to paragraphs 207 and 208 of the Guide. First, in paragraph 207 there is a reference to the "treatment of a foreign claim". Since no definition of a "foreign claim" is given in the Model Law, the use of such a term may create uncertainty. Besides, article 30 does not distinguish between "local" and "foreign" claims. Second, paragraph 208 states that the undertaking in Part B "can be made either by an insolvency representative appointed in a State other than the enacting State […], or by a group representative appointed in a planning proceeding in the enacting State." We believe that only the insolvency representative (solely or together with a group representative) appointed in the enacting State (i.e. the State "approving the undertaking") should be able to make such an undertaking. This is due to the fact that it is a particular insolvency estate that is relied upon to support the provision of an undertaking and it is only an insolvency representative of such estate that can represent it and should be authorised to provide an undertaking (albeit, with the court confirmation or approval).[12]

Recommendation 15. To create a clear distinction in the scope and operation of article 28 and article 30 and to avoid confusion as to who may provide an undertaking, the latter may be drafted as follows [parts in bold are added]:

"To minimize the commencement of main proceedings or to facilitate the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, an insolvency representative of an

[12] See for similar reasoning para. 197 of the Guide.

enterprise group member **appointed in this State** may undertake to accord to those claims the treatment in this State that they would have received in an insolvency proceeding in that other State and the court in this State may approve that treatment. **Where a group representative is appointed in this State (unless the group representative and the insolvency representative are the same person), the undertaking should be given jointly by an insolvency representative appointed in this State and such group representative."**[13]

16. Article 31 of the Model Law is similar to article 29, except for the fact that under the former it is the main insolvency proceeding that can be stayed or declined. Thus, recommendations given for the alteration of article 29 are largely applicable to article 31 of the Model Law.

Recommendation 16. To align article 31 with article 30, the former may read as follows:

"If an insolvency representative (jointly with a group representative, if appointed) from another State in which an insolvency proceeding is pending has given an undertaking under article 30, a court in this State may:

(a) Approve the treatment to be provided in the foreign non-main proceedings to the claims that could be brought by a creditor of the enterprise group member in this State;"

17. Article 32 of the Model Law contains two rules. Its first paragraph provides for "additional relief" upon recognition of a foreign planning proceeding. In particular, the court may stay or decline to commence an insolvency proceeding. In our opinion, such a relief is already available under article 24 of the Model Law. For example, article 24(1)(d) allows the court to stay any insolvency proceedings concerning the enterprise group member. According to article 24(1)(i), any additional relief may also be available.

Paragraph two of article 32 provides for the means of approving a group insolvency solution. Paragraph 241 of the Guide states that such means are different to those referred to in article 26. This is not necessarily so as the article 26 is rather flexible and mentions "approvals and confirmations required in accordance with the law of this State." This formulation is sufficiently broad to include direct court approval, as suggested in article 32(2). The power of the court to grant relief described in article 24 without the planning proceeding being preliminarily recognized may be added to article 26.

Recommendation 17. Exclude article 32 from the Model Law. If necessary, articles 24 and 26 can be amended to incorporate provisions, replicating provisions suggested in article 32 of the Model Law.

[13] The joint approval is needed to align article 30 with article 28(1)(a) of the Model Law. Besides, we argue that the sole approval by a group representative should not suffice, since s/he might not be in charge of the insolvency estate to back up the undertaking.