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Insolvency Law

Facilitating the cross-border insolvency of multinational enterprise groups

Note by the Secretariat

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Introduction

1. In July 2013, the Commission adopted the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), which includes new material on aspects of the concept of "centre of main interests" (COMI), and part four of the UNCITRAL Legislative Guide on Insolvency Law (the UNCITRAL Legislative Guide), which addresses the obligations of directors in the period approaching insolvency. The Commission noted that the current mandate of Working Group V as it related, inter alia, to COMI, had not been exhausted by completion of the Guide to Enactment and Interpretation and that issues relating to enterprise groups remained. The Commission agreed that Working Group V (Insolvency Law) should hold a colloquium in the first few days of the working group session scheduled for December 2013 to clarify how it would proceed with the enterprise group issues and other remaining parts of its current mandate. It should also consider topics for possible future work, including insolvency issues specific to micro, small and medium-sized enterprises (MSMEs). The conclusions of the colloquium were not be determinative, but to be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work were to be reported to the Commission in 2014.[1]

2. At its forty-fourth session in December 2013, following the three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, which would extend the existing provisions of the Model Law on Cross-Border Insolvency and part three of the UNCITRAL Legislative Guide, as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.[2] While the Working Group considered that those provisions might, for example, be a set of model provisions or a supplement to the existing UNCITRAL Model Law, the precise form they might take could be decided as the work progressed.

3. The issues agreed by the Working Group as establishing the outline for its future work[3] are discussed below, in the context of the existing articles and recommendations of the UNCITRAL Model Law and the UNCITRAL Legislative Guide; references from other texts are provided for information and inspiration. These include the proposal for amendment of the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (EC Regulation proposal);[4] the draft Guidelines for Coordination of Multinational Enterprise Group Insolvencies, developed by the International Insolvency Institute in 2012 (MEG Guidelines);[5] and the Transnational Insolvency Principles of

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No.17* (A/68/17), para. 326.

[2] UNCITRAL texts are available from www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

[3] A/CN.9/798, para. 16.

[4] As contained in COM (2012) 744 final, Strasbourg, 12/12/2012, available from http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf.

[5] Available from www.iiiglobal.org/component/jdownloads/viewdownload/362/5953.html.

Cooperation among NAFTA Countries, developed by the American Law Institute in 2003 (the NAFTA Principles).[6]

I. Facilitating the cross-border insolvency of multinational enterprise groups

Definitions: enterprise group

(a) Provisions

(i) Legislative Guide, part three

4. Subparagraph 4(a) of the Glossary provides that an "enterprise group" is "two or more enterprises that are interconnected by control or significant ownership". Subparagraph (b) provides that an "enterprise" is "any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law."

(ii) EC Regulation proposal

5. Article 2, paragraph (i), defines a "group of companies" to mean "a number of companies consisting of parent and subsidiary companies". Article 2, paragraph (j), defines a "parent company" to mean a company which:

> "(i) has a majority of the shareholders' or members' voting rights in another company (a "subsidiary company"); or
>
> (ii) is a shareholder or member of the subsidiary company and has the right to
>
> (aa) appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary; or
>
> (bb) exercise a dominant influence over the subsidiary company pursuant to a contract entered into with that subsidiary or to a provision in its articles of association."

(iii) MEG Guidelines

6. The Guidelines define a "multinational enterprise group" to mean "those companies established in more than one country which are linked together by some form of control, whether direct or indirect, or ownership, by which linkage their businesses are centrally controlled or coordinated."

7. The MEG Guidelines are intended to apply to groups with members, operations, assets and employees located in more than one country, which has unified corporate governance, either through common or interlocking shareholding or by contract. It is suggested that the Guidelines may also be of use to groups whose component parts operate with relative independence.[7]

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[6] Available from www.ali.org/doc/InsolvencyPrinciples.pdf.

[7] MEG Guidelines, Introduction, pages 6-7.

(b) Notes

8. The explanations included in the Glossary to part three of the Legislative Guide were discussed in the following documents: A/CN.9/WG.V/WP.76, paragraph 3(b); A/CN.9/618, paragraphs 55-58; A/CN.9/622, paragraphs 77-84; A/CN.9/643, paragraphs 123-127; A/CN.9/647, paragraphs 14-23, 28-29; and A/CN.9/666, paragraphs 43-45.

9. The Working Group may wish to consider whether the explanations provided in part three are sufficient for the current work. In particular, consideration might be given to the relevance of the level of integration of the group to the issues raised below i.e. are they more likely to apply in the case of closely integrated groups than to groups in general. Integration in groups and its impact on the issues included in part three is discussed in the commentary, for example, chapter I, paragraph 15; chapter II, paragraphs 4 and 12, as well as in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4 (summarized in paras. 8 and 9 of A/CN.9/WG.V/WP.114).

A. Guiding principles

1. Affirmation of the corporate identity and independence of group members

Legislative Guide, part three

10. Recommendation 219 and paragraph 105 of the commentary affirm the principle of maintaining the separate legal identity of each member of an enterprise group; it is recommended that exceptions to that principle be limited to the situations outlined in recommendation 220 in which substantive consolidation might be justified:

"(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

"(b) Where the court is satisfied that the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity."

2. Distinctions between main and non-main insolvency proceedings might not be useful in group enterprise insolvencies

11. The distinction between main and non-main proceedings (based on COMI and establishment respectively) is a key element of both the EC Regulation and the Model Law. In the EC Regulation, COMI concerns the proper place for commencement of proceedings and thus applicable law, while in the Model Law, it forms the basis of the recognition process and determines the relief flowing from recognition of a foreign proceeding. In both of those instruments, the focus is upon an individual debtor.

12. The application of the COMI concept to the group situation has been the subject of several working papers[8] and the issue has been discussed by the Working Group on numerous occasions.[9] At its thirty-first session, for example, the Working Group concluded (A/CN.9/618, para. 54) that the difficulties of achieving an agreed definition of the COMI of an enterprise group suggested the need to focus, instead, on facilitating the conduct of group cross-border insolvency proceedings by way of coordination and cooperation. At its thirty-fifth session, the Working Group generally agreed (A/CN.9/666, paras. 26-27) that it would be difficult to reach a definition of the COMI of an enterprise group in order to limit commencement of parallel proceedings or to apply the recognition regime of the Model Law to the enterprise group as a whole.

B. Access and standing

1. Access to foreign courts for foreign representatives and creditors of insolvency proceedings involving enterprise group members

(a) Provisions

(i) Model Law

13. Article 9 of the Model Law provides a right of direct access for the foreign representative to courts in the State enacting the Model Law. The right of direct access is accompanied by a limitation of the jurisdiction of the courts of the enacting State to the application itself; the sole fact of making an application under the Model Law will not subject the foreign representative or the foreign assets and affairs of the debtor to that jurisdiction for any other purpose (article 10). Foreign creditors have the same rights of access to proceedings in the enacting States as creditors of that State (article 13).

(ii) Legislative Guide, part three

14. Recommendation 239 (a) addresses the same issue in the context of enterprise groups: it is recommended that the insolvency law should permit foreign representatives and creditors to have access to domestic courts.

(b) Notes

15. Right of access in the Model Law is limited to the foreign representative as defined in article 2, subparagraph (d) ("a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"), and to foreign creditors. "Creditor" is not a term defined in the Model Law, although it is explained in the Legislative Guide as being "a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceeding" (Terms and definitions, para. 12(j)). The focus of the use of both of those terms in those texts is the

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[8] A/CN.9/WG.V/WP.74/Add.2 (paras. 5-12); A/CN.9/WG.V/WP.76/Add.2 (paras. 2-17); A/CN.9/WG.V/WP.82/Add.4 (paras. 10-15); A/CN.9/WG.V/WP.85/Add.1 (paras. 3-13); A/CN.9/WG.V/WP.99, paras. 55-64; and A/CN.9/738, paras. 36-37.

[9] The conclusions reached in these discussions are summarized in A/CN.9/WG.V/WP.114.

connection to a single debtor; in the group context, the focus may need to be broader to encompass creditors or the insolvency representatives of several members of the same group that are subject to insolvency proceedings. While recommendation 239 addresses access for foreign representatives and creditors to domestic courts, it does not explicitly refer to access by the foreign representative or creditor of any group member to the courts conducting proceedings concerning other group members.

16. The Working Group may wish to consider (a) whether the insolvency representative of any group member subject to insolvency proceedings should have access to all insolvency proceedings concerning group members; and (b) whether the creditors of any group member subject to insolvency proceedings should have access to the proceedings concerning all other group members. Access for such creditors might be addressed through the formation of a group creditor committee.

2. "Standing" for all group members in any insolvency proceeding applied for by a member of the enterprise group

(a) Provisions

(i) Model Law

17. Upon recognition of a foreign proceeding, the Model Law provides standing for a foreign representative to participate in any local insolvency proceeding regarding the debtor in the enacting State (article 12), to initiate an action for avoidance of antecedent transactions in the enacting State (article 23), and to intervene in any proceeding in the enacting State in which the debtor is a party (article 24). Foreign creditors have the same rights to commence an insolvency proceeding and to participate in local proceedings as creditors of the enacting State (article 13).

(ii) EC Regulation proposal

18. Draft article 42d of the proposal to amend the EC Regulation provides that each insolvency representative appointed in insolvency proceedings concerning one group member will have standing in the proceedings concerning other members of the same group. In particular, the insolvency representative has a right to be heard and participate in the other proceedings (in particular by attending creditors' meetings), to request a stay of the other proceedings, to propose a reorganization plan in the other proceedings in a way that would enable the respective creditors' committee or court to take a decision on it in accordance with the applicable law of those proceedings, and to request additional procedural measures that may be necessary to promote reorganization.

(iii) MEG Guidelines

19. Guideline 3 provides that to the extent permitted by local law, the court should authorize other enterprise group members or their insolvency representatives to be heard on matters that materially affect their rights or interests in the enterprise group.

20. Guideline 4 provides that the court sitting in a jurisdiction that has adopted the UNCITRAL Model Law should not decide the COMI of a group member until it has

first ascertained the facts relating to the group's structure, location and solvency and has heard from authorized insolvency representatives of other group members on the proper location of that group member's COMI.

(b) Notes

21. Standing in the Model Law is based upon recognition of the foreign proceeding in accordance with chapter III. A foreign proceeding may be recognized if, inter alia, the foreign representative applying for recognition is, pursuant to article 17, subparagraph (1)(b), "a person or body within the meaning of subparagraph (d) of article 2", i.e. authorized to perform certain functions with respect to the debtor. The foreign representative has to provide evidence of that authorization in accordance with article 15, paragraph (2), as part of the application for recognition.

22. In a group context, there is a need to consider the extent and structure of the group in order to determine who might have standing to, for example, participate in proceedings concerning group members. An insolvency representative might be required, for example, to provide to the court which commences the insolvency proceedings to which he or she is appointed certain information relating to the composition, structure, location, solvency and affairs of each group member or of each group member that will be relevant to the insolvency proceedings concerning the group. That information might include, for example, the proper name and registered office of each group member, the names of officers and directors of each group member, details of any insolvency proceedings commenced with respect to group members and the financial arrangements of the group. That information might then be made available to all other courts conducting group proceedings, although some way of avoiding significant duplication of information in large group insolvencies might be desirable.

23. The issue of the linkages between group members was discussed in the Working Group for the purposes of making a joint application for commencement of insolvency proceedings in the domestic context. The Working Group considered whether a recommendation specifying the relevant factors should be developed, but concluded that since the basis of the joint application was that the debtors were members of a group, information substantiating the existence of the group would generally be required in order for the court to commence the insolvency proceedings (A/CN.9/647, para. 35).

24. The approach of article 18 of the Model Law might also be relevant, requiring foreign representatives to update the information provided to the receiving court on an ongoing basis.

25. There is also an issue of the scope of standing in the group context and whether the insolvency representatives of all group members would have standing analogous to articles 12 and 24 of the Model Law with respect to all other group members subject to insolvency proceedings. In large groups, that approach might require research into the provisions of local law in numerous jurisdictions. The same comment could be made with respect to creditors and article 13. As noted above, creditor issues might be addressed through the formation of a group creditor committee.

3. Group members voluntarily joining the insolvency proceeding of the parent group member and agreeing to subject themselves to the jurisdiction of that proceeding

(a) Provisions

(i) Legislative Guide, part three

26. No provision to this effect is included in part three in so far as it addresses the cross-border context. In the domestic context, recommendation 238 addresses the issue in a limited manner, permitting a solvent member (or at least one not subject to insolvency proceedings) of an enterprise group to voluntarily participate in a reorganization plan proposed for one or more members of that enterprise group that are subject to insolvency proceedings.

(ii) NAFTA Principles

27. Principle 23 provides that a subsidiary should be permitted to apply for insolvency in the jurisdiction in which the parent's insolvency proceedings have commenced, so that reorganization can be administered on a group basis. Where there is no proceeding in the States of the subsidiary's main interests, procedural or substantive consolidation should be available under applicable law in the jurisdiction of the parent's insolvency. The possibility of parallel proceedings is acknowledged, in which case coordination should facilitate achievement of the benefits of consolidation as far as possible.

(b) Notes

28. The Working Group's conclusions on participation of solvent group entities in the insolvencies of other group members (in the domestic context) can be found in documents A/CN.9/618, paragraphs 18-20, and A/CN.9/622, paragraphs 17-19.

29. Paragraphs 11-15 of Chapter II (Domestic issues) of the commentary to part three discuss the possibility of permitting a solvent group member to be party to a joint application for commencement in a domestic context and the situations in which that might be appropriate. A distinction is drawn between an apparently solvent member which, on further investigation is shown to fall within the commencement criteria of recommendation 15 either on the basis of insolvency or imminent insolvency, and members not falling within that category. In the latter situation, the Guide considers different approaches. Firstly, where the solvent member does not meet the criteria for commencement of insolvency proceedings, it might nevertheless be in the best interests of the group as a whole, especially where the group is closely integrated, for that member to participate in the proceedings. Factors that may be relevant to determine whether the necessary degree of integration exists are mentioned in Chapter II, paragraph 12. A further approach may be to allow such participation where the group is fictitious or where the situation would support substantive consolidation under recommendation 220 (substantive consolidation).

30. Paragraph 152 of Chapter II (Domestic issues) discusses the situations in which it might be appropriate to allow a solvent group member to agree to participate in a reorganization plan for other group members, subject to addressing

certain concerns, including as to the need for confidentiality of information about that solvent group member (especially in the context of the disclosure statement).

31. The jurisdiction of the relevant court is essential for voluntary submission. It will be necessary to ensure that when subsidiaries want to participate in the insolvency proceedings of, for example, another subsidiary or even to appear when their interests are affected, the receiving court doesn't lack jurisdiction. The Working Group may wish to discuss the explicit granting of jurisdiction and some of the group scenarios in which that might be appropriate.

C. Recognition

1. Recognition of foreign proceedings and foreign representatives (as between different proceedings concerning different group members), including recognition of foreign proceedings commenced against several group members at the same court

(a) Provisions

(i) Model Law

32. Chapter III of the Model Law establishes the framework for recognition of foreign proceedings concerning a single debtor. These articles address the application and supporting documentation required (article 15), presumptions concerning recognition (article 16), the decision to recognize a foreign proceeding (article 17) and subsequent information (article 18).

(ii) Legislative Guide, part three

33. Recommendation 239 (b) recommends the insolvency law provide for recognition of foreign proceedings in the context of enterprise groups, if necessary under applicable law. Part three focuses on the desirability of providing legislative authorization for this recognition where it would be necessary to facilitate the cooperation and coordination that is the focus of Chapter III (International issues) (paras. 11-13).

(b) Notes

34. The Working Group's discussion on including provisions on recognition in part three is contained in A/CN.9/686, paragraphs 17-21. The Working Group may wish to consider whether a recognition regime along the lines of the Model Law might be developed and if so, the enterprise group situations in which it might be relevant and how it might relate to other points raised here, such as voluntary submission to jurisdiction, the provisions that such a regime might need to include and the legal effects of recognition.

2. Identification of the "parent" and/or "primary group members" of an enterprise group that might adopt the role of, for example, facilitating development of a reorganization (or liquidation) plan, coordinating continuation or replacement of existing finance and retaining professionals

3. Recognition of one foreign proceeding as the coordinating proceeding, in appropriate circumstances

(a) Provisions

(i) Legislative Guide, part three[10]

35. Having considered the question of a coordination centre in some detail (see Notes below), the Working Group decided not to pursue it and accordingly, part three does not include recommendations addressing one group proceeding taking up a coordinating role, although that role is addressed in terms of the insolvency representative (see paras. 62-64 below).

(ii) MEG Guidelines

36. The Guidelines introduce the concept of a "group centre" (GC), which means "the jurisdiction from which the operations of an integrated multinational enterprise are directed" and provide a framework for conduct of insolvency proceedings concerning group members centred on the GC. In introducing the concept, it is noted that use of the concept of COMI is avoided, principally because of the different functions it fulfils in the EC Regulation and the UNCITRAL Model Law and the difficulties of identifying what it would mean in the group context.[11] Guideline 9, however, provides that when proceedings have commenced in different jurisdictions with respect to multinational enterprise group members, a court with jurisdiction over a group member may consider delaying its decision on that member's COMI until the GC court has made a decision on the COMI of the group as a whole.

37. The Commentary also notes that since many integrated multinational enterprise groups are controlled centrally, the cross-border insolvencies of those groups would function more efficiently if they were coordinated under central direction.[12]

38. Guideline 12 provides that when insolvency proceedings commence in the context of a group that has operated as an integrated enterprise, and international coordination is likely to assist in maximizing the value of assets for all creditors, a GC should be identified to direct that coordination. Other Guidelines provide: that the GC is presumptively the proper jurisdiction for insolvency proceedings concerning group members over which the GC has jurisdiction (Guideline 13); other courts with jurisdiction over group members should acknowledge the jurisdiction of the GC over the group (Guideline 14); each group member seeking relief should file its own main case in the GC (Guideline 15); all cases concerning group members should be administratively coordinated in the GC (Guideline 16); any stay

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[10] The Working Group's discussion of COMI and coordination centres in the context of enterprise groups is summarized in A/CN.9/WG.V/WP.114.

[11] Commentary, pages 9-10.

[12] Ibid., page 10.

applicable in the GC should be enforced internationally (Guideline 17); other proceedings concerning group members may only be commenced as secondary proceedings (Guideline 18); and where applications to commence group insolvency proceedings are made in two or more jurisdictions, those jurisdictions should not make decisions until all interested parties have had the opportunity to be heard on the location of the GC and, if appropriate, communication has taken place between the courts of jurisdictions in which requests to commence proceedings concerning other group members have been made (Guideline 19).

39. Guideline 21 addresses the situation in which the GC cannot assert jurisdiction over a meaningful segment of the enterprise group members where, for example, a single GC is determined not to be appropriate because the group lacks sufficient integration to justify full central coordination or the asserted jurisdiction of the GC is not respected in other jurisdictions. In those cases, coordination will be important.

40. The notes accompanying the Guidelines do not specify the factors relevant to identifying the GC, although they do refer to the factors concerning group integration as outlined in the UNCITRAL Legislative Guide (part three, chapter I, para. 15). It is observed that the GC should be readily ascertainable in groups with strong integration and central management.[13]

(iii) EC Regulation proposal

41. The proposal does not adopt either of the approaches referred to in points 2 and 3 above, but rather focuses on main and secondary proceedings, and measures that limit commencement of the latter (see below) and expand the role of the courts in the former.

42. Proposed recital 20b provides that the introduction of rules on the insolvency of groups should not limit the possibility of a court commencing insolvency proceedings for several members of the same group in a single jurisdiction if the court finds that the COMI of those members is located in a single Member State. In such situations, the court should also be able to appoint, if appropriate, the same insolvency representative in all proceedings concerned (see point G1 below).

(b) Notes

43. The Working Group's discussion of the coordination centre is summarized in document A/CN.9/WG.V/WP.114 and the paragraphs below indicate key points. At its thirty-fifth session, the Working Group concluded, among other things (A/CN.9/666, para. 32), that it might be possible to develop a rule to facilitate the coordination of group insolvency proceedings by identifying one group member, such as the controlling member, to function as the "coordination centre" for those proceedings. The Working Group considered various factors that might be relevant to identifying the controlling member of a group, including factors relevant to the degree of integration of the group (document A/CN.9/WG.V/WP.82/Add.4, paras. 6 and 13).

44. Identifying a coordination centre in an enterprise group brought with it a number of the difficulties associated with identifying the COMI of an individual

[13] MEG Guidelines, Section III, Central coordination of multinational enterprise groups insolvencies, pages 12-13.

debtor. Those concerned, in particular, identifying the State that should make the decision with respect to the location of the coordination centre and whether that decision could be enforced or at least recognized in other States.

45. At its thirty-sixth session that possibility was further discussed at some length (A/CN.9/671, paras. 18-23) based on the issues raised in A/CN.9/WG.V/WP.85/Add.1, paragraphs 3-13. It was ultimately agreed that recommendations on the identification of a coordination centre in a manner that was non-binding and would have no legal consequences should not be included in part three. The issue was, however, to be addressed in the commentary and in the final version of recommendation 250. Recommendation 250 (c) suggests that, as one form of cooperation between insolvency representatives, one of them might take on a coordinating role.

46. The Working Group may wish to consider whether it would be possible to develop an approach based upon points 2 and 3 above, including the enterprise group situations in which that approach would be appropriate, perhaps by reference to the degree of integration of the group or some other factors; how identification of the coordination centre or primary group member would relate to a recognition regime (e.g. would the court commencing proceedings with respect to the parent or coordination centre of a group identify it as such, would it be the basis on which those proceedings might be recognized as foreign proceedings, and would the recognizing court have to satisfy itself independently that the foreign group member was the parent or coordination centre in much the same way as COMI is determined under the Model Law); the factors relevant to identification of such a centre; the legal effect of such identification and the rules required to support that legal effect, especially in the cross-border context; the default position that would apply in cases where identification or agreement on a coordination centre was not possible; and other issues that would need to be addressed.

D. Minimizing parallel proceedings

1. Use of "synthetic non-main proceedings" (where creditors are treated in the main proceeding as if a non-main proceeding had opened) to reduce cost and expense

(a) Provisions

(i) EC Regulation proposal

47. The proposal includes several provisions on synthetic non-main proceedings. Article 18, paragraph 1, provides, among other things, for the insolvency representative of the main proceeding to give an undertaking that the distribution and priority rights that local creditors would have had if non-main proceedings had commenced will be respected in the main proceedings. Such an undertaking is to be subject to the form requirements, if any, of the State of the commencement of the main proceeding and is to be binding on, and enforceable against, the insolvency estate.

48. Article 29a provides that the court seized of the request to commence the non-main proceeding is required to notify the insolvency representative of the main proceeding and provide an opportunity for that person to be heard prior to making its decision. At the request of that insolvency representative, the court should

postpone its decision on commencement or refuse to commence the non-main proceeding if that proceeding would not be necessary to protect the interests of local creditors. Particular reference is made to the cases where the insolvency representative gives an undertaking as referred to in article 18, paragraph 1, and complies with its terms. The insolvency representative of the main proceeding can challenge a decision to commence a non-main proceeding.

49. The proposal includes provision for notice of the commencement of non-main proceedings, as well as for rapid dissemination of information on those proceedings to creditors, and the establishment of free, publically accessible electronic registers of cases commenced in jurisdictions subject to the Regulation (recital 29a and articles 20a-d, 21 and 22). Article 20a specifies the information to be available in the Register, article 20b deals with interconnection of the registries, article 20c with costs and article 20d with registration of insolvency proceedings. Articles 21 and 22 deal with publication and registration in other Member States. This measure is intended, inter alia, to assist in preventing the commencement of non-main proceedings by improving the information available to creditors and courts.

(b) Notes

50. Use of "synthetic" non-main proceedings avoids the formal opening of a non-main proceeding by promising local creditors that they will not fare worse than if a "real" non-main proceeding had been opened because the priority they would be entitled to under local laws will be respected in the main proceeding. Typically, that promise or undertaking is provided by the insolvency representative appointed in the main insolvency proceeding.

51. Synthetic non-main proceedings may have numerous benefits, including cost savings (e.g. payment of the fees of only one insolvency representative and the costs of only one court), shorter time frames for completion of the proceedings, fewer disputes and less competition between proceedings, more efficient creditor participation, reduced need for coordination and cooperation between potentially numerous proceedings, more effective cross-border reorganization, and reduction of the obstructions caused by the removal of part of the assets of the debtor from the control of the insolvency representative of the main proceeding. Certain cases are often cited as providing good examples of how such proceedings might work in practice and the advantages they might bring.[14]

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[14] In *Collins & Aikman* [*In the matter of Collins & Aikman Europe, SA*, the High Court of England and Wales, Chancery Division in London, [2006] EWHC 1343 (Ch)] an administration proceeding commenced in the United Kingdom, which was the COMI of certain European operations that spanned several European Union jurisdictions. Certain Spanish trade creditors sought to commence non-main proceedings in Spain in order to protect the treatment their claims would receive under Spanish insolvency law, but not under the United Kingdom rules. A special category of claim was created for the Spanish creditors so that they would be entitled to a distribution identical to what they would receive under Spanish law, but within the main United Kingdom insolvency distribution. Objections were lodged in the United Kingdom proceedings to this proposal. The debtor prevailed and the Spanish claims were paid on that basis. Significant costs were saved and control was preserved in the United Kingdom main proceeding without the unpredictability that was likely to occur if a non-main proceeding was commenced. Cases concerning *Nortel Networks* and *MG Rover* are also cited as examples of the use of synthetic proceedings.

52. Limitations on the use of synthetic proceedings might include the difficulty of addressing claims other than those of a purely monetary value (for example, where monetary claims are connected with some additional administrative protection, such as the need in some jurisdictions to have employee redundancies sanctioned by a court); the reliance on domestic courts being able (and willing) to provide assistance by doing whatever they could have done in the case of a domestic insolvency, and, in the other case, deferring to that being done elsewhere and not commencing a non-main proceeding; defining if and when a duty to give the undertaking arises and the extent of that duty; and deciding the circumstances in which it might be appropriate to use such proceedings (it may only be realistic, for example, where the result will not lead to the foreign priority claims devouring or having a significant impact upon the main estate).[15] The Working Group might wish to consider how these issues might be addressed to facilitate the wider use of such proceedings.

E. Relief

1. Relief that may be provided by a recognizing court to the foreign representative(s) presiding over the proceedings of several group members commenced in the same forum

2. Relief that may be provided by a recognizing court to the foreign representative(s) presiding over the coordinating proceeding

(a) Provisions

(i) Legislative Guide

53. Neither of these points is addressed in part three of the Legislative Guide.

(ii) Model Law

54. The Model Law provides for three types of relief — provisional relief available between the making of an application for recognition and the decision on that application (article 19), relief available automatically following recognition of a foreign main proceeding (article 20) and additional discretionary relief available to both foreign main and non-main proceedings following recognition (article 21).

(iii) EC Regulation proposal

55. Draft article 42d, subparagraph 1 (b) permits an insolvency representative appointed with respect to any group member to request a stay of proceedings commenced with respect any other member of the same group. The court that commenced the latter proceedings should stay those proceedings (for up to

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[15] The court analysis in *Collins & Aikman* recognized that the claims of the Spanish creditors would only meaningfully affect one of the 24 subsidiaries not already in non-main proceedings. In a case that predated adoption of the Model Law, *In re Treco* [240 F.2d 148, 159 (2d Cir. 2001)], the court expressed concern about the disparity in the treatment of a secured claim between the law of the country where the funds were located and the law of the country which sought to administer the funds. The court gave that disparity as reason for refusing to order transfer of the funds. However, the court did not consider whether the funds could be transferred subject to application of the law of the transferring jurisdiction or, in other words, provide the secured creditor with a form of synthetic protection.

three months) in whole or part if it is proven that the stay would be beneficial for the creditors in those proceedings. The stay may be renewed or continued for the same time period and the court ordering the stay may require the insolvency representative of the main proceeding to take measures to guarantee the interests of creditors.

(iv) MEG Guidelines

56. Guideline 17 provides that the stay applicable in the proceedings commenced in the Group Center should be enforced internationally with respect to each group member. Non-main proceedings under Guideline 18 may be opened where it is necessary to enforce the stay ordered by the Group Center court.

(b) Notes

57. A basic principle of the Model Law is to provide the relief considered necessary for the orderly and fair conduct of a cross-border insolvency, whether that is provided on an interim basis or as a consequence of recognition. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the foreign proceeding the relief that would be available under the law of the enacting State. The Model Law also includes measures to ensure coordination of the relief provided as between main and non-main proceedings and local and foreign proceedings (articles 28-29). The Working Group may wish to consider whether the relief regime of the Model Law might be useful in the group context and in particular the connection between relief and recognition; and the impact of recognition of a number of different foreign proceedings on the court's ability to tailor relief to those proceedings and to coordinate relief among the different proceedings.

F. Post-application and post-commencement finance

1. Joint financing among members of the enterprise group addressing issues of collateralization, supplier credit, guarantees, obligations and validation of collateral granted and priority for funds advanced

(a) Notes

(i) Legislative Guide, part three

58. Part three addresses post-application and post-commencement finance in the context of domestic groups only; the Working Group concluded that the recommendations applicable in that context were not directly applicable in the international context as various difficulties would arise, such as matters of personal liability of directors and insolvency representatives for new debt, the application of avoidance provisions, competence and priorities for certain types of claims under applicable law and their cross-border recognition (A/CN.9/647, para. 89; A/CN.9/666, para. 75).

59. Paragraphs 47-51 of the commentary note that post-application finance is covered by recommendation 39 of the Legislative Guide, which deals with provisional measures. The Working Group's conclusions on post-application finance are contained in A/CN.9/643, paras. 49-51.

60. Recommendations 211-216 and paragraphs 55-74 of the commentary address post-commencement finance in the context of domestic enterprise groups. These recommendations address authorization for post-commencement finance to be provided by one group member to another subject to insolvency proceedings and the various forms that might take (recommendation 211), the pre-conditions for post-commencement finance (recommendation 212), possible authorization by the court or creditors (recommendation 213), provision of post-commencement finance by one group member subject to insolvency proceedings to another group member also subject to insolvency proceedings (recommendation 214), priority (recommendation 215) and security (recommendation 216).

61. Post-commencement finance in the international context was discussed in the following documents: A/CN.9/WG.V/WP.74/Add.2, paragraphs 15-22; A/CN.9/WG.V/WP.82/Add.4, paragraphs 17-25; A/CN.9/622, paragraphs 87-91; A/CN.9/647, paragraph 89; A/CN.9/666, paragraphs 33-37 and 75.

G. Participants

1. Joint appointment of insolvency representatives to insolvency proceedings concerning different group members

(a) Provisions

(i) Legislative Guide, part three

62. Recommendation 251 of part three addresses the possibility of appointing the same or a single insolvency representative to more than one group member and suggests that a court be permitted to coordinate with foreign courts to achieve this goal. Recommendation 252 addresses measures that might be taken where conflicts of interest arise.

(ii) MEG Guidelines

63. Guideline 10 provides that a single insolvency representative should be appointed to all proceedings commenced in respect of members of the same enterprise group to handle matters in which group members have common interests and as to which there are no conflicts of interest among the group members.

(b) Notes

64. Appointment of insolvency representatives in the international context was discussed in documents A/CN.9/666, paragraph 105, and A/CN.9/671, paragraphs 51-54. Aside from noting the clear benefits of such an approach, the commentary of part three (Chapter III, paras. 43-47) points to some of the difficulties, noting that some jurisdictions require insolvency representatives to be registered or licensed; any insolvency representative appointed in multiple jurisdictions would need to comply with the legal requirements and obligations applicable in all of those jurisdictions; and potential conflicts of interest that might arise across the group members to which the person is appointed need to be addressed.

2. Creditors

(a) Provisions

(i) EC Regulation proposal

65. Article 42d provides that an insolvency representative appointed in insolvency proceedings concerning one group member shall have the right to be heard and participate, in particular by attending creditors' meetings, in any of the proceedings commenced with respect to any other members of the same group.

(ii) MEG Guidelines

66. In addition to the appointment of a single insolvency representative, Guideline 11 provides that there should be a single officeholder to represent, for example, creditor committees and representatives, to the extent not precluded by conflicts of interest.

(b) Notes

67. Paragraph 49 above notes the inclusion in the proposal for amendment of the EC Regulation of registries of insolvency proceedings to ensure information is available to creditors and other stakeholders and to minimize commencement of secondary proceedings.

68. The issue of creditor access to information was discussed at the forty-fourth session of the Working Group (December 2013). The proposal contained in paragraphs 33-34 of document A/CN.9/WG.V/WP.117 made several points including that: while creditors may have access to a local insolvency representative for local proceedings, creditors that are geographically distant from the local proceeding may not have such access or the knowledge as to how to gain access to the case, the insolvency representatives or information about the status of the case; in some jurisdictions, the representative may not be required to communicate with creditors, making the process appear opaque; and while the UNCITRAL Model Law addresses cooperation between the courts and between foreign representatives, it does not address cooperation between creditor representatives (official or unofficial). It was noted that recommendations 126-136[16] of the Legislative Guide address the participation of creditors in domestic insolvency proceedings, but that such participation was not addressed in the cross-border or group context.

69. The proposal suggested a number of provisions that could be added to the Legislative Guide or considered in any future work on groups, including providing initial information to creditors on location, types of asset and asset value; reporting to creditors about the status of the case and on significant dispositions of assets and payment of claims; addressing cooperation between insolvency representatives and creditors, creditor representatives or creditor committees; facilitating easier access to courts or insolvency representatives; ensuring consistency and simplicity of claims procedures; and providing information to insolvency representatives and courts about common claims of similarly situated creditors. More detail is provided

[16] Recommendation 137 might also be relevant as it relates to the right to be heard.

in the colloquium presentations for session B1, available at www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013-papers.html.

70. Another issue that might be considered is cross-filing of claims, where each insolvency representative may assert the claims made in their proceeding in every other proceeding concerning the same debtor, allowing every claim to share in the distribution in every proceeding. That may be facilitated by filing a "class" proof of claim on behalf of all creditors. In the group context, cross-filing may be relevant beyond individual debtors and involve multiple members of the same group.

H. Cooperation and coordination

1. Authorizing contact and coordination between the courts and between the insolvency representatives (including foreign representatives or other group members designated by the group) across enterprise group members subject to insolvency proceedings

(a) Provisions

(i) Legislative Guide, part three

71. Recommendations 240-250 build upon Chapters IV and V of the Model Law. Recommendations 240-245: authorize cooperation to the maximum extent possible between courts and between courts and insolvency representatives in respect of insolvency proceedings concerning members of the same enterprise group (recommendation 240); suggest possible forms of cooperation (recommendation 241); authorize direct cross-border communication (recommendation 242); suggest the conditions that should apply to cross-border communication involving courts (recommendation 243) and the effects of communication (recommendation 244); and address the coordination of hearings (recommendation 245).

72. Recommendations 246-250 authorize: cooperation to the maximum extent possible between the insolvency representatives and the courts in respect of insolvency proceedings concerning members of the same enterprise group (recommendation 246); cooperation between insolvency representatives appointed in different group proceedings (recommendation 247); direct communication between the insolvency representative and foreign courts concerning the proceedings to which the insolvency representative was appointed and other proceedings concerning the same group (recommendation 248); and direct communication between insolvency representatives appointed to insolvency proceedings concerning different group members (recommendation 249). Possible forms of cooperation between insolvency representatives are also suggested (recommendation 250).

73. These recommendations are limited to indicating the role of the insolvency representative in cross-border cooperation; they do not explicitly provide for the involvement or appointment by the group of any other person to engage in cooperation and coordination of proceedings. Recommendation 241(c) does suggest that such a person might be appointed at the direction of the court; this recommendation is based on article 27, subparagraph (a), of the Model Law.

(ii) EC Regulation proposal

74. The proposal extends the existing coordination and cooperation provisions (which are limited to insolvency representatives) of the EC Regulation to include the courts. Article 42a establishes a duty to cooperate and communicate information with other insolvency representatives appointed to group member proceedings (para. 1) and specifies possible means of cooperation — communicating with each other, exploring the possibilities for reorganization of the group and coordinating the administration and supervision of the groups affairs (para. 2). Paragraph 2 also provides that the insolvency representatives may agree to grant additional powers to the insolvency representative appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings.

75. Article 42b addresses communication and cooperation between courts, establishing an obligation to cooperate "to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them" (para. 1); authorizing direct communication (para. 2); and specifying possible means of cooperation, including coordinating conduct of hearings and coordination of the approval of protocols (para. 3).

76. Article 42c addresses cooperation and communication between insolvency representatives and courts, establishing an obligation for the insolvency representative to communicate with any court before which there is an application for commencement of proceedings with respect to a group member or which has commenced such proceedings "to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them". The insolvency representative may request information from that court regarding the other member of the group or request assistance with respect to the proceedings to which he or she has been appointed.

(iii) NAFTA Principles

77. According to Procedural Principle 24, coordination and cooperation should apply to parallel proceedings involving a subsidiary of a foreign parent debtor to the same extent as it applies to parallel proceedings involving the debtor. It is acknowledged that certain decisions, such as allocation of value, may be determined differently because of the need to respect the corporate form.

(iv) MEG Guidelines

78. Guidelines 5 and 6 recommend use of the Court-to-Court Communication Guidelines[17] to facilitate communication between courts and that insolvency representatives should communicate freely and openly with debtors and other insolvency representatives to ensure cooperation and coordination. Creditors should support such cross-border communication among debtors and insolvency representatives. Guideline 20 recommends that where a group has assets in more than one country, or requires assistance from the court with respect to its reorganization or liquidation, the courts should cooperate in the same manner as

[17] Available at www.iiiglobal.org/component/jdownloads/viewcategory/394.html.

they are required to cooperate under the UNCITRAL Model Law with respect to a single debtor.

(b) Notes

79. Part three contains quite detailed recommendations and discussion of cooperation and coordination in the group context that provides an appropriate basis for further discussion.

2. Use of cross-border insolvency agreements to clearly define procedures and roles

(a) Provisions

(i) Model Law

80. Article 27, subparagraph (d), of the Model Law suggests, as one means of implementing cooperation, the approval or implementation by courts of agreements concerning the coordination of proceedings.

(ii) UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation[18]

81. The Practice Guide compiles, in some detail, best practice on the use of such agreements.

(iii) Legislative Guide, part three

82. Recommendations 253 and 254 authorize insolvency representatives and other parties in interest to enter into cross-border agreements covering multiple members of an enterprise group (recommendation 253) and courts to approve or implement such agreements (recommendation 254).

(iv) EC Regulation proposal

83. Chapter IVa addresses the insolvency of members of a group of companies. Article 42a, paragraph 1, includes, in the context of cooperation and communication between insolvency representatives, authorization for cooperation in the form of agreements or protocols. Article 42b, subparagraph 3 (d), includes, in the context of communication and cooperation between courts, cooperation by means of coordination of the approval of agreements.

(v) MEG Guidelines

84. Guideline 7 provides for courts to direct, authorize or permit the debtor or insolvency representative to enter into agreements with other group members to further the objectives of the Guidelines. Guideline 8 provides that where the court is not permitted to authorize or direct parties in accordance with Guideline 7, debtors or insolvency representatives should initiate such agreements where permitted.

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[18] Available from www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html.

(b) Notes

85. The provisions quoted above indicate widespread support for the use of agreements in cross-border insolvency cases and provide abundant material for further discussion.

I. Reorganization

1. Provision for joint/coordinated disclosure statements and plans of reorganization

(a) Provisions

(i) Legislative Guide, part three

86. Recommendation 237 addresses this issue in the context of domestic enterprise groups; there is no equivalent recommendation in Chapter III dealing with international issues, although it is addressed in terms of coordination between insolvency representatives. Recommendation 250 (e) refers to one means of cooperation between insolvency representatives in the cross-border context as being "coordination with respect to the proposal and negotiation of reorganization plans."

(ii) EC Regulation proposal

87. Chapter IVa of the proposal addresses the insolvency of members of an enterprise group. Article 42a, subparagraph 2 (b), provides that in pursuance of cooperation, insolvency representatives should explore the possibilities for reorganizing the group and where such possibilities exist, coordinate with respect to the proposal and negotiation of a coordinated reorganization plan. Article 42d, subparagraph 1 (c), provides the insolvency representative with the right to, inter alia, propose a reorganization plan or other measure for all or some members of the group for which insolvency proceedings have commenced and to introduce it into any of the proceedings commenced with respect to other members of the same group in accordance with law applicable to those proceedings. The insolvency representative may also request any additional procedural measure under the law referred to in subparagraph (c) that may be necessary to promote reorganization.

(iii) NAFTA Principles

88. ***Recommendation 5: Binding Effect of Plans***

The NAFTA countries should adopt provisions requiring approval of main proceeding reorganization plans by courts in non-main proceedings despite a lack of compliance with rules for approval of such plans under domestic law if (a) the plan distribution will include significant value from assets or operations from outside the approving country; (b) the plan has been approved under the voting requirements of the law of the main proceeding; (c) creditors and other interested parties from the approving country have had a fair and reasonable opportunity to participate in the main proceeding; and (d) the plan does not discriminate unfairly on the basis of national citizenship, residence, or domicile. The provisions should also make such a plan final and binding in the approving country on the rights of all parties interested in the debtor's affairs to the same extent as it is under the law of the main proceeding.

(b) Notes

89. Paragraphs 147 to 151 of Chapter II (Domestic issues) of the commentary to part three discuss a number of the issues connected with preparation and approval of joint and coordinated reorganization plans.

90. Material concerning the coordination of reorganization plans in the cross-border context was included in the following documents relating to part three: A/CN.9/WG.V/WP.76/Add.2, paragraphs 28-32; A/CN.9/WG.V/WP.82/Add.4, paragraphs 33-36.

91. At its thirty-fifth session the Working Group concluded that in the international context "provided the proceedings commenced in different jurisdictions were reorganization proceedings, all group members could propose the same plan, subject to domestic law with respect, for example, to priorities. The Working Group agreed that that approach should be discussed in the commentary, together with the role of cross-border agreements, cooperation and coordination" (A/CN.9/666, para. 110). Paragraph 51(h) of Chapter III refers to "coordination and harmonization of reorganization plans" as being one area of cooperation that might be addressed in a cross-border insolvency agreement.