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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. At its forty-fourth session in December 2013, following a 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 that would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed.

2. Those issues agreed by the Working Group as establishing the outline for its future work were discussed at its forty-fifth session in April 2014. They form the basis of this working paper, which considers those issues in the context of a possible legislative regime to facilitate the conduct of cross-border insolvency proceedings affecting multiple members of an enterprise group. That context is intended to provide a means of connecting the various issues discussed at the forty-fifth session of the Working Group and serve as a starting point for discussion at the forty-sixth session. The form such a regime might take, for example, model law or model legislative provisions or additional guidance on the implementation and interpretation of existing provisions, is a question to be decided by the Working Group. It might be borne in mind, however, that adding further material to, or changing the approaches adopted in, part three of the Legislative Guide, which was completed only in 2009, might require appropriate justification, such as by reference to developments or changes in insolvency practice.

I. The goals of a cross-border insolvency regime for groups

3. At the outset, it might be helpful to identify some of the goals of a regime to facilitate the conduct of insolvency proceedings affecting multiple group members. One approach might be to follow the structure of the UNCITRAL Model Law and create a legislative regime for access, recognition, relief and cooperation, to address insolvency proceedings affecting different debtors that are connected by membership of the same enterprise group. Such a regime might be extended in the group context to include provisions on:

(a) Identifying the jurisdiction(s) in which insolvency proceedings for the insolvent group members might be commenced;

(b) Facilitating participation of multiple members in a single proceeding or a coordination proceeding, possibly by way of voluntary submission to jurisdiction, and extending procedural coordination to enterprise groups;

(c) Limiting the number of insolvency proceedings that commence with respect to group members;

(d) Permitting voluntary participation of solvent group members in the proceedings concerning insolvent members, particularly when those proceedings are for reorganization;

(e) Appointing a limited number of insolvency representatives, as recommended in part three of the UNCITRAL Legislative Guide;

(f) Coordinating reorganization plans, as recommended in part three of the UNCITRAL Legislative Guide; and

(g) Recognizing post-commencement finance granted in another jurisdiction.

II. Key elements of a group regime

4. A simple scenario might be helpful to structure the discussion on these key elements:

> Insolvency proceedings for enterprise group members A and B commence in country Z. A is the parent company of the enterprise group. Creditors are seeking to commence proceedings against group members C and D in country Y.

A. Access[1]

5. The first issue might relate to the provision of access to foreign courts for purposes of requesting recognition and relief.

6. The Working Group agreed at its forty-fifth session[2] that different rights of access might be required depending on the nature of the insolvency proceedings affecting the group. Article 9 of the UNCITRAL Model Law refers to access for a foreign representative. In the group context, in accordance with Model Law, article 2 (d), access might be provided to the insolvency representative appointed to insolvency proceedings concerning group member A to make applications with respect to A or other group members, such as B, particularly where B is participating in an insolvency solution for the group as a whole. Access might also be provided to some other authorized person, such as the representative of a solvent group member that is participating in insolvency proceedings concerning group members (see paras. 58 and 61-63 below).

7. Access for foreign creditors is addressed in article 13 of the Model Law and is limited to the access provided to local creditors. In the group context, the Working Group agreed that access for foreign creditors might only be appropriate in specific circumstances.[3] One example given was where creditor claims were to be treated "synthetically" in insolvency proceedings conducted in a different jurisdiction (see paras. 27-29 below). This situation might need to be distinguished from more

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[1] UNCITRAL Model Law, articles 9 and 13, Guide to Enactment and Interpretation paras. 25-28, 108 and 118; UNCITRAL Legislative Guide, part three, recommendation 239(a) and commentary, chapter III, paras. 11-13.

[2] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, para. 18.

[3] Ibid., para. 19.

general issues of access, such as to information, discussed in paragraphs 56-58 below, where greater, rather than more restricted, access might be appropriate in the group context.

8. The Working Group also suggested that group members might have access analogous to that of creditors under the Model Law;[4] the Working Group might wish to consider whether, in many situations, it might be sufficient to allow access for the foreign representatives of those members and to the representatives of solvent members.

B. Recognition of foreign proceedings[5]

9. Recognition under the UNCITRAL Model Law focuses upon insolvency proceedings commenced with respect to an individual debtor and is based upon whether those proceedings commenced at the location where the debtor had its centre of main interests (COMI) or an establishment at the time proceedings commenced.[6] The resulting status of the recognized proceeding, as either main or non-main (see Model Law, article 17), is linked directly to the relief that can be provided to the foreign proceeding. This framework might be used in the group context and possibly extended to provide types of relief additional to those available under articles 20 and 21 of the Model Law (relief is discussed below).

10. Preliminary questions to consider with respect to recognition of insolvency proceedings involving different group members might include the purpose for which recognition could be sought and the basis upon which it might be granted.

1. Purpose of recognition

11. Recognition in other jurisdictions (including country Y) of the proceedings concerning A and B commenced in country Z might be sought to achieve several outcomes. These outcomes might focus on limiting the number of proceedings commenced with respect to all group members and seeking relief and assistance to deal with assets and affairs of the various group members in different jurisdictions.

2. Basis of recognition: status of the proceedings in country Z — use of the distinction between main and non-main proceedings

12. A difficult question for consideration in the group context concerns the basis on which proceedings concerning group members might commence and thus ground an application for recognition.

13. The UNCITRAL Model Law criteria of COMI and establishment can be applied in the enterprise group context for each individual group member. Several cases concerning the cross-border reorganization of enterprise groups have been concentrated in a limited number of jurisdictions, based upon courts in those jurisdictions finding that most, if not all, of the group members had their COMI in

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[4] Ibid.

[5] UNCITRAL Model Law, articles 15-24 and Guide to Enactment and Interpretation, paras. 29-34, 127-208; UNCITRAL Legislative Guide, part three, recommendation 239(b) and commentary, chapter III, paras. 11-13.

[6] See UNCITRAL Model Law, Guide to Enactment and Interpretation, paras. 157-160.

those jurisdictions. In the scenario outlined above, the proceedings for A and B might have commenced in country Z on the basis that country Z is the COMI of those two group members, determined in accordance with the factors indicated in the Guide to Enactment and Interpretation (paras. 145-147). Those proceedings might be recognized under the Model Law as main proceedings, with the applicable effects. Any local proceedings that might be commenced in country Y or other jurisdictions for A and B after recognition of the proceedings in country Z would be non-main proceedings and subject to the provisions of chapter V of the Model Law, e.g. under article 28, those proceedings would be limited to the assets located in that State or that, for reasons of cooperation and coordination, should be administered in that State. If the proceedings in country Z were based upon establishment, rather than COMI, they could still be recognized, but as non-main proceedings and the effects of recognition would be slightly more limited. The focus of relief in that case might be upon seeking to avoid or limit the commencement of main proceedings.

14. The COMI and establishment criteria could also be applied to analyse the situations of C and D. Thus, the representative of A and B may also seek to open main proceedings in country Z against group members C and D if it could be shown that the COMI of those subsidiaries or an establishment was located in country Z. The representative might then seek recognition of those proceedings (as main or non-main proceedings) in country Y.

15. The use of the Model Law approach in that way may, however, be insufficiently flexible to facilitate the insolvency treatment of enterprise groups and could lead to extensive litigation on issues of COMI. It may not always be possible to limit commencement to a small number of jurisdictions in which COMI (or establishment) might be found and for larger groups that restriction might prove to be an insurmountable obstacle to reorganization.

16. One suggestion has been to allow group members such as C and D to commence proceedings in country Z, irrespective of any connection they might have to that jurisdiction, on the basis that they are members of the same enterprise group as A and B. The goals of such a course of action would include facilitating the negotiation of an insolvency solution for the group as a whole, thus maximizing value for all group members; simplifying the conduct of the different insolvency proceedings, especially the need for coordination and cooperation, thus reducing costs and enabling the use of mechanisms such as procedural coordination[7] and appointment of the same insolvency representative.[8]

17. If such proceedings could be commenced in country Z, safeguards to protect the interests of creditors of C and D might include: ensuring that they are no worse off than they would have been had local proceedings commenced in country Y, providing an assurance that their claims will be dealt with in the proceedings in country Z, possibly by applying the law of country Y (see below, paras. 27-29) and recognizing in country Z the priorities of those claims under the applicable law. The court in country Z might be required to adhere to a standard such as that that approach was reasonable and rational in the best interests of the group and necessary to maximize the value of the group. A rebuttable presumption might be

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[7] UNCITRAL Legislative Guide, part three, chapter II, paras. 22-37, recommendations 202-207.

[8] Ibid., paras. 142-145, recommendations 232-233.

created to assist, for example, to the effect that commencement in country Z is reasonable. If not rebutted, those proceedings could be recognized elsewhere.

18. A number of factors might be identified as being relevant to the choice of country Z for commencement of the insolvency proceedings concerning A, B, C and D. Those might include that it is the COMI of one group member — in this case, the group parent A, but it need not necessarily be linked to the COMI of the parent, but rather to the COMI of at least one group member; country Z could be the location of the central administration of the group; the size and nature of the group makes the choice of country Z seem reasonable and not unexpected from a creditor's standpoint; or there is a significant and ascertainable connection between the part of the enterprise group involving group members A, B, C and D and country Z.

19. If recognition of the insolvency proceedings for A, B, C and D was required elsewhere, for example, to obtain relief, the relevant legislative regime would need to adopt a broader approach than the Model Law approach of recognizing proceedings only on the basis of COMI and establishment.

20. There are likely to be objections to such a course of action. Using the wording of the Guide to Enactment and Interpretation (para. 145), it could be said that commencing proceedings for C and D in country Z is not an outcome that would be readily ascertainable by creditors of C and D; their legitimate expectations would be that in the event of insolvency, proceedings would be conducted in a different venue. There are jurisdictional issues concerning the basis upon which the courts of country Z could take jurisdiction over C and D absent a connection with country Z such as COMI, establishment or presence of assets and the basis upon which country Y and other jurisdictions might defer to the proceedings commenced in country Z.

C. Relief[9]

1. Introduction

21. At its forty-fifth session,[10] the Working Group noted that part three of the UNCITRAL Legislative Guide did not address the provision of relief in the international context and that the provisions of the UNCITRAL Model Law might be extended for that purpose. It was further noted, however, that a stay, of the kind automatically applicable under article 20 of the Model Law upon recognition of a foreign proceeding, was likely to be required in the group context for a slightly different purpose, that is, to limit the commencement of local proceedings and deter action by local creditors that might be detrimental to any solution being pursued for the group as a whole. Moreover, relief in a group context was likely to be based upon factors beyond those specified under the Model Law, involving different debtors in different jurisdictions connected by virtue of membership of the same enterprise group, rather than the assets and affairs of a single debtor.

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[9] UNCITRAL Model Law, articles 20-21 and Guide to Enactment and Interpretation, paras. 35-39 and 176-195.

[10] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 27-29.

2. Application of a stay in the group context: revision of the European Insolvency Regulation (EIR)[11]

22. An example of a stay available in the context of proceedings for enterprise group members is provided by article 42d of the draft revisions to the EIR. This article permits an insolvency representative appointed in insolvency proceedings commenced with respect to an enterprise group member to request, to the extent appropriate to facilitate the effective administration of the proceedings, a stay of any measure related to the realization of the assets in proceedings commenced with respect to any other group member, subject to certain conditions. These include that:

(a) A reorganization plan for all or some group members subject to insolvency proceedings has been proposed and has a reasonable chance of success;

(b) Such a stay is necessary in order to ensure the proper implementation of the plan;

(c) The plan would be to the benefit of the creditors in the proceedings for which the stay is requested; and

(d) No group coordination proceeding has commenced (see paras. 45-46 below).

23. Before ordering the stay, the court is to hear the insolvency representative appointed in the proceedings to be affected by the stay. The initial stay is limited to three months, but can be extended for another three months subject to certain conditions. The court ordering the stay may require the insolvency representative requesting the stay to take any measure (available under national law) necessary to protect the interests of creditors in the proceedings to be affected by the stay.

3. Relief that might be required in the enterprise group context

24. Types of relief that might be required in the group context, based upon the scenario outlined above, could include:

(a) A stay on commencement (or continuation) of insolvency proceedings concerning A and B in country Y;

(b) A stay on commencement (or continuation) of proceedings concerning C and D in country Y on the basis of a proposal that the claims of creditors of those two group members can be dealt with in the proceedings in country Z (see paras. 27-29 below);

(c) Commencement of local insolvency proceedings in country Y for C and D in cases where creditors' claims against C and D cannot be addressed in the proceedings in country Z. Commencement of the insolvency proceedings against C and D in the scenario above could be sought by an insolvency representative

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[11] European Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings. References to the EIR in this paper are to the document entitled "Council of the European Union, Proposal by the Presidency as a compromise for adoption on 5-6 June 2014, Brussels, 3 June 2014" [10284/14 Add1, JUSTCIV 134; EJUSTICE 54; CODEC 1366] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [First reading] available at http://conflictoflaws.net/News/2014/06/Council-insolvency.pdf.

appointed in the proceedings concerning A and B. It will be recalled that under article 9 of the Model Law, recognition of the foreign proceeding or the foreign representative in order to commence a local proceeding is not required;

(d) The effects of recognition under article 20 of the Model Law and relief and assistance for the proceedings in country Z of the kind available under article 21 of the Model Law to deal with assets and affairs of A, B, C and D in country Y (and possibly other jurisdictions), including a stay of the right to enforce foreign security rights where global reorganization is proposed;[12]

(e) Extension of any stay to include solvent group members, if required;[13]

(f) Approval by a recognizing court of post-application and post-commencement finance approved elsewhere and the priority accorded to it (see paras. 36-38 below); and

(g) Approval by a recognizing court of the use of assets in the recognizing jurisdiction to secure post-commencement finance provided to a group member in a different jurisdiction.

25. Conflict may arise between different applications e.g. an application from local creditors to commence insolvency proceedings and from foreign insolvency representatives to stay that commencement. Possible factors to be considered by the court in deciding whether to commence local proceedings are identified below in paragraphs 31 and 32. A specific rule might be required to enable the local court to coordinate the different applications.

26. Notice of the local application would need to be provided to relevant group insolvency representatives. Safeguards for creditors similar to those applicable under article 22 of the Model Law are likely to be appropriate.

4. Addressing the claims of foreign creditors in local proceedings

27. At its forty-fifth session,[14] the Working Group expressed interest in exploring the use of so-called "synthetic" measures and how they might facilitate the conduct of enterprise group insolvencies. The following discussion attempts to address the issues raised by the Working Group.

(a) Examples of the use of so-called "synthetic" measures

28. In various cases involving the insolvency of enterprise group members under the EIR, the insolvency representatives of the main proceedings have offered, in order to minimize the commencement of secondary proceedings, to treat foreign creditors in the main proceeding as far as possible according to the creditors' local law. Examples include *In the matter of Collins & Aikman Europe, SA*,[15] *Re MG Rover Group Limited*[16] and *Re MG Rover Belux SA/NV*,[17] and *Re Nortel*

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[12] UNCITRAL Legislative Guide, recommendation 46(b).

[13] See UNCITRAL Legislative Guide, part three, chapter II, paras. 39-46 and part two, recommendations 46, 48, 50 and 51.

[14] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 21-22.

[15] [2006] EWHC 1343, [2006] BCC 861.

[16] Unreported, 8 April 2005.

Networks SA.[18] In some instances, the entitlement of the foreign creditors under the foreign law was greater than their entitlement under the law of the main proceedings. In each case, the court of the main proceeding approved the payment of those entitlements in accordance with the foreign law in order to achieve the purpose of the main proceedings.

29. These synthetic measures have been used in an enterprise group context where a group-wide solution is being devised or pursued in main proceedings (which may have commenced in a single jurisdiction) for multiple group members and the commencement of secondary proceedings for any of those group members in other jurisdictions would have adversely affected the achievement of that solution. Although used in a group context, these measures have been applied in respect of individual group members.

(b) Safeguarding the interests of local creditors in country Y

30. Provisions addressing the use of those types of measure might include firstly, safeguards for creditors, such as requiring that they should be no worse off as a result of treatment of their claims in the foreign proceeding than they would have been had a local proceeding commenced (unless creditors agreed to different treatment), and second, that those creditors could participate or be represented in the foreign proceeding. Where "no worse off" treatment could not be guaranteed, a local proceeding could be commenced. Notice of the application for the local proceeding would desirably be provided to the representative of the foreign proceedings, who might have some degree of control over the commencement of those local proceedings (see para. 35 below).

(c) Factors relevant to a decision to commence proceedings in country Y

31. Commencement of proceedings in country Y might be appropriate in the above scenario where, for example:

(a) "No worse off" treatment of the creditors of C and D cannot be assured in the proceedings in country Z;

(b) The law applicable to those claims in country Y cannot be applied in the proceedings in country Z;

(c) Claims in country Y are not of a purely monetary nature;

(d) Claims in country Y cannot realistically be treated in the proceeding in Z, because, for example, of the nature of the claim. Some claims, for example, might require some sanction by the courts of country Y;

(e) Priority claims in country Y will have a significant impact on the insolvency estates in the proceedings in country Z;

(f) There are irreconcilable differences between the insolvency law of country Z and the applicable law in country Y;

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[17] [2006] EWHC 2377.

[18] [2009] EWHC 206, [2009] BCC 343.

(g) The law of country Y offers conditions not available under the law of country Z, such as for termination of contracts or avoidance of claims that will benefit the global solution for the group or will assist achievement of the purposes of the proceedings in country Z; and

(h) The benefit of commencing proceedings in country Y will outweigh the disadvantages of commencing and coordinating multiple proceedings.

(d) Factors relevant to a decision to decline to commence proceedings in country Y

32. The court in country Y might decline to commence local proceedings where a variety of possible factors were present, such as that those proceedings:

(a) Lacked purpose (Appeal Court in *SAS Rover France*);[19]

(b) Would not improve the protection of stakeholder interests in country Y, which could be adequately protected in the proceedings in country Z (*SAS Rover France*);

(c) Would not improve the realization of assets located in country Y (*SAS Rover France*);

(d) Were not required to address claims or realization of assets in country Y;

(e) Would impede achievement of the purpose of the proceedings in country Z, e.g. reorganization, where the proceedings being sought in country Y were liquidation;

(f) Were not in the global best interests of the enterprise group as a whole; and

(g) Were opposed by the insolvency representative of the proceedings in country Z.

(e) Powers of the insolvency representative appointed in country Z

33. An insolvency representative appointed in country Z might require certain powers in order to address the claims of creditors from country Y (and possibly other jurisdictions) in the proceedings in country Z:

(a) The ability to seek to prevent or limit the commencement of proceedings in country Y (and possibly other jurisdictions), provided the interests of potential stakeholders in those proceedings could be adequately protected,[20] or to seek a stay should those proceedings commence;

(b) The right to be heard on any application for commencement of proceedings in country Y (and possibly other jurisdictions); and

(c) The ability to respect priorities applicable in country Y (and possibly other jurisdictions) where a group member has an establishment without local proceedings necessarily having to be commenced, to give appropriate assurances to

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[19] *SAS Rover France*, decision of the Court of Appeal of Versailles, 15 December 2005, available in French at www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000006947365&fastReqId=831989940&fastPos=3.

[20] Adequate protection of creditor interests is required by the UNCITRAL Model Law art. 22, Guide to Enactment and Interpretation, paras. 196-199.

creditors in country Y to that effect and make payments to those creditors that might be greater than strictly permitted under the law applicable to the proceedings in country Z.

34. With respect to any assurance that might be given by an insolvency representative to local creditors to achieve this "synthetic" treatment of their claims, the draft EIR revision[21] contains a number of provisions (article 28a) relating to the form in which that assurance should be given ("in writing"); the law applying to approval requirements; parties required to approve ("known local creditors"); legal effect of the undertaking ("binding on the insolvency estate"); provision of notice of the undertaking; measures to ensure compliance; challenges to distribution in accordance with the undertaking; and liability for damage resulting from non-compliance with the undertaking. The giving of an undertaking does not remove the right of local creditors to apply for the commencement of secondary proceedings, but does provide the basis for the local court not to commence those proceedings where it is satisfied that the general interests of local creditors are adequately protected (article 29a.2) by the undertaking. The foreign representative is entitled to be notified of any such request and must be given the opportunity to be heard. A stay of commencement of secondary proceedings may be granted for up to three months to enable negotiations between the debtor and creditors and other protective measures may apply to protect the interests of local creditors during the stay. A decision to commence secondary proceedings can be challenged by the foreign representative of the main proceedings.

35. Where local proceedings in country Y are required, the insolvency representative of the proceedings in country Z might need, in addition to powers of the type included as discretionary relief under article 21 or, following recognition, under articles 11, 12, 23 and 24 of the UNCITRAL Model Law, the following:

(a) The ability to control the commencement of proceedings in country Y (and possibly other jurisdictions) and determine whether and when such proceedings should be commenced and what type of proceeding they should be (e.g. liquidation or reorganization);

(b) The right to be notified of applications for commencement of such proceedings;

(c) The right to participate in meetings of creditors in country Y (and possibly other jurisdictions);

(d) The right to seek conversion of proceedings in country Y, e.g. from liquidation to reorganization, to assist achievement of the purpose of the proceedings in country Z;

(e) The ability to coordinate negotiation of a reorganization plan for A, B, C and D;

(f) The right to propose a coordinated reorganization plan in whichever jurisdictions approval of that plan was required; and

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[21] It should be noted that the proposed revisions to the EIR are based on maintaining the distinction between main and secondary (non-main) proceedings for individual enterprise group members.

(g) The right to request any additional procedural measures under the law applicable to insolvency proceedings in country Y that might be necessary to promote the group reorganization.

5. Additional forms of relief: post-application and post commencement finance[22]

36. The provision of post-application and post-commencement finance in the enterprise group context is addressed in part three, chapter II of the UNCITRAL Legislative Guide, recommendations 211-216. Based on the recommendations included in part two of the Legislative Guide (recommendations 63-68), they deal with the issues relevant to provision of such finance between group members, including the relevant criteria to be considered, but do not address cross-border aspects.

37. At its forty-fifth session,[23] although broadly agreeing on the importance of post-application and post-commencement finance, the Working Group did not reach agreement as to how that topic should be approached in the cross-border context. One suggestion, to consider the provision of such finance in the context of relief, was agreed to be a good starting point. The relief sought might include, as noted in paragraph 24 (f) and (g) above, approval for, or recognition of, post-commencement finance granted in another jurisdiction and the priority accorded to it, as well as use of assets in the recognizing jurisdiction to secure post-commencement finance provided to a group member in a different jurisdiction. In considering whether such relief should be granted, the court might take into consideration, in addition to the criteria included in recommendation 212 of the Legislative Guide, issues such as whether the provision of finance balances group and individual member's interests, safeguards the global best interests of all group members taken together and protects the interests of local creditors.

38. The question of cross-border provision of finance was discussed in the context of the insolvency of financial institutions in document A/CN.9/WG.V/WP.109, paragraph 48. That paragraph refers to recital 22 of the draft European Commission directive (COM (2012) 280/3), which notes that the provision of financial support from one entity of a cross-border group to another entity of the same group is currently restricted under many national laws. Although those laws are designed to protect the creditors and shareholders of each entity, they do not take into account the interdependency of the entities of the same group or the group interest. The paragraph notes the measures included in the proposal, including the possibility of voluntary agreements drawn up and approved (in accordance with national laws) in advance of financial difficulties occurring. Chapter III, articles 16-22 of the proposal address the content and approval of financing agreements; conditions required to provide finance and the decision to provide finance; opposition to the provision of finance, as well as disclosure.

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[22] UNCITRAL Legislative Guide, part three, recommendations 211-216 and commentary chapter II, paras. 47-51 and 55-74.

[23] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 30-31.

D. Cooperation and coordination[24]

39. Part three of the UNCITRAL Legislative Guide includes a number of recommendations that expand the cooperation provisions of chapter IV of the UNCITRAL Model Law for application in the enterprise group context. Those recommendations might be included in a legislative regime of the type being considered.

1. Extending the coordination and cooperation provisions of part three of the Legislative Guide to solvent group members

40. At its forty-fifth session,[25] the Working Group noted that in addition to extending access provisions to solvent group members, consideration might also be given to extending the provisions of part three, chapter III of the Legislative Guide on cooperation and coordination to include such group members or their representatives where they participate in an insolvency solution such as group reorganization. So, for example, recommendations on cooperation between courts and insolvency representatives might include representatives of solvent group members; similarly, recommendations on cooperation between insolvency representatives might be extended to include those representatives of participating solvent group members.

41. Consideration might need to be given to whether such recommendations should be drafted as broadly as recommendations 240-250 or whether such cooperation would only be relevant in specific circumstances and thus limited, for example, to issues directly involving or concerning the participating solvent group members.

2. Identifying a coordinating court

42. At its forty-fifth session,[26] the Working Group discussed the possibility of identifying a coordinating court that could play a role, for example, in promoting the negotiation and evaluating the feasibility of a reorganization plan for the group. It was suggested[27] that there should be a minimum connection between any chosen location and the group and that the choice should be rational (see paras. 17 and 18 above). Recommendations 240-245 of part three of the UNCITRAL Legislative Guide relating to cooperation by the courts would be relevant, as would recommendation 246 and 248 relating to cooperation between courts and insolvency representatives in the international context.

43. A coordinating court might be chosen on grounds similar to those suggested above in paragraph 18. Additional factors might include that that location is:

(a) Where viable post-commencement finance for the group reorganization is available; and

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[24] UNCITRAL Legislative Guide, part three, recommendations 240-250 and chapter III, paras. 14-40.

[25] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 23-25.

[26] Ibid., paras. 35-36.

[27] Ibid.

(b) Suitable for promoting and evaluating a coordinated reorganization plan (where the plan would be approved by the courts of the jurisdictions in which approval is required).

44. The coordinating court might be determined by other courts cooperating and coordinating their activities in keeping with principles of net global benefit for the group and protection of the interests of local creditors. In so doing, those courts may play a proactive role or simply take a permissive or hands off approach and defer to the coordinating court.[28]

3. Group coordination proceedings

45. The draft revisions to the EIR include the concept of a group coordination proceeding (articles 42d1-17) that can be started once insolvency proceedings concerning individual group members have commenced in order to coordinate those proceedings. The purpose of those provisions is to recommend a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies, in particular, measures to be taken in order to re-establish the economic performance and financial health of the group or any part of it; settlement of intra-group disputes concerning intra-group transactions; and avoidance actions and agreements between insolvency representatives of the insolvent group members (article 42d12). The revisions establish: pre-conditions for requesting the commencement of such a proceeding, persons who may request commencement, procedures to be followed, choice of the coordinating court, procedures for objecting to inclusion of group members in the proceeding, opt-in subsequent to commencement, group coordination plans, costs and distribution.

46. Those provisions reflect and extend recommendations 202-210 of part three, chapter II of the UNCITRAL Legislative Guide concerning procedural coordination of insolvency proceedings affecting group members, where those proceedings are conducted in the same jurisdiction. As suggested above, procedural coordination could be relevant in the situation where multiple group proceedings are commenced in country Z.

4. Appointment of a group coordinator

47. Part three, chapter III, paragraph 37 of the Legislative Guide discusses the possibility of appointing a court representative to coordinate multiple international proceedings in the cross-border group context. It outlines the possible role such a person might play, but does not address how that person might be appointed or which court might make the appointment. It notes, however, that that person should be considered neither an additional insolvency representative nor a substitute for an existing insolvency representative. It also notes that the appointing court will typically outline the terms of the person's authority and the extent of their powers to act. No specific recommendations are included on this point in part three, although the possibility of such an appointment is mentioned in recommendation 241(c), dealing with cooperation to the maximum extent possible involving courts, which mirrors the language of article 27(a) of the UNCITRAL Model Law.

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[28] Deferral is discussed in the UNCITRAL Practice Guide, chapter II, paras. 18-20 and chapter III, paras. 75-78.

48. As noted above, the EIR draft revisions contain provision for appointment of a group coordinator in the context of a group coordination proceeding. The coordinator must be a person eligible to be appointed as an insolvency representative, a person other than one appointed in the individual proceedings participating in the group coordination, and have no conflict of interest in respect of the group members participating in the group coordination, their creditors or their insolvency representatives. There appears to be no requirement for the coordinator to be connected to the jurisdiction of the court chosen under draft article 42d6 to have exclusive jurisdiction over the group coordination.

49. The EIR revisions address proposal and appointment (including revocation) of the coordinator; tasks and obligations of the coordinator; cooperation between the coordinator and the insolvency representatives of group members and costs.

50. The coordinator's obligations (article 42d12 (1)) are to:

(a) Identify and outline recommendations for the coordinated conduct of the insolvency proceedings;

(b) Propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may contain proposals for:

(i) The measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;

(ii) The settlement of intra-group disputes as regards intra-group transactions and avoidance actions; and

(iii) Agreements between the insolvency representatives of the insolvent group members.

51. The coordinator may also (article 42d12 (2)):

(a) Be heard and participate, in particular by attending creditors' meetings, in any of the insolvency proceedings opened with respect to any member of the group;

(b) Mediate any dispute arising between two or more insolvency representatives of group members;

(c) Present and explain the group coordination plan to the persons or bodies required to receive such a report under applicable national law;

(d) Request information from any insolvency representative in respect of any group member where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the insolvency proceedings concerning group members; and

(e) Request a stay for a period of up to six month of the proceedings opened with respect to any group member, provided that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the insolvency proceedings for which the stay is requested, or request the cessation of any existing stay. This request shall be made to the court that opened the insolvency proceedings for which a stay is requested.

52. Recommendations on coordination are specifically prohibited from including consolidation of insolvency proceedings or insolvency estates (article 42d12 (3)) and the coordinator's rights and tasks extend only to those group members participating in the group coordination (42d12 (4)).

E. Other issues

1. Participants: Insolvency representatives[29]

53. At its forty-fifth session,[30] the Working Group noted recommendation 251 of part three of the UNCITRAL Legislative Guide and considered ways in which it would be possible to achieve the appointment of the same or a single insolvency representative to all group members subject to insolvency proceedings. Where those proceedings commence in the same jurisdiction, such an appointment should be possible in accordance with recommendation 251. When those proceedings commence in different jurisdictions, additional solutions would be required. One approach might be for courts to recognize licensed foreign practitioners for appointment in their jurisdiction. A key concern noted by the Working Group was in respect of regulatory issues, particularly of a disciplinary nature, that were likely to arise if an insolvency representative were to be appointed outside the jurisdiction in which they were licensed or regulated and whether that regulatory regime could extend to activities undertaken in a foreign jurisdiction.

54. A different approach might be to consider appointment of a co-insolvency representative in jurisdictions where local proceedings are required or, as envisaged in article 21(1)(e) of the UNCITRAL Model Law as a form of discretionary relief, designation by the recognizing court of a person to administer or realize assets located in the recognizing jurisdiction. Consideration might be given to whether that designated person could act at the direction of a lead insolvency representative, to ensure coordination of the proceedings and enable that insolvency representative to have some degree of control over the various proceedings concerning group members (see paras. 45-52 above on group coordination proceedings and coordinators).

55. The Working Group also noted the need to maintain the possibility of a debtor in possession, which is included in the definition of a foreign representative in the Model Law, continuing in that position in the group context.

2. Participants: Creditors[31]

56. At its forty-fifth session,[32] the Working Group generally agreed on the desirability of strengthening the participation of creditors and interested parties in insolvency proceedings concerning group members. Recommendations 126-136 of

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[29] UNCITRAL Legislative Guide, part three, recommendations 251-252 and chapter III, paras. 43-47.

[30] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, para. 32.

[31] UNCITRAL Legislative Guide, recommendations 126-136 and commentary, part two, chapter III, paras. 75-115.

[32] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 33-34.

the UNCITRAL Legislative Guide address the right to participation; voting; convening of meetings of creditors; creditor representation; and committee membership, rights and functions; employment of professionals by a creditor committee; liability of creditor committees; and removal or replacement of members of a creditor committee. Issues of confidentiality are addressed in recommendation 111.

57. Additional issues that might need to be addressed in the group context could include the following, some of which are noted in recommendation 204 of part three of the Legislative Guide on procedural coordination:

(a) Access to initial information on location, types and ownership of assets and asset value;

(b) Reporting on the status of cases, significant dispositions of assets and payment of claims;

(c) Cooperation between insolvency representatives and creditor committees and/or creditor representatives;

(d) Cooperation between creditor committees in concurrent insolvency proceedings concerning enterprise group members;

(e) Creditor access to courts or insolvency representatives to assert claims;

(f) Rationalization of claims procedures;

(g) Streamlining resolution of creditor disputes; and

(h) Issues of the law applicable to creditor committees.

58. Some of these issues might be addressed by:

(a) Establishing, in reorganization and possibly also liquidation, a group creditor committee to facilitate provision of notice, access to information and streamline decision-making, subject to safeguards to prevent domination by powerful creditors;

(b) Appointing a representative for creditors of each group member;

(c) Appointing a representative for solvent group members involved in group reorganization; and

(d) Establishing a committee of all group representatives, including those of solvent group members, to facilitate coordination, work with creditors, negotiate reorganization plans, coordinate treatment of foreign creditors' claims in the main proceedings, and discuss post-commencement finance.

3. Reorganization[33]

59. At its forty-fifth session,[34] the Working Group considered various scenarios involving reorganization and focused on identification of the (lead) coordinating

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[33] UNCITRAL Legislative Guide, part three, recommendations 237-238 and commentary, chapter II, paras. 146-152.

[34] Report of Working Group V (Insolvency Law) on the work of its forty-fifth session (New York, 21-25 April 2014), A/CN.9/803, paras. 35-37.

court and the role it could play in any group reorganization solution — this issue is discussed in paragraphs 42-44 above.

(a) Coordinated reorganization plans

60. The application of recommendation 237 of part three of the UNCITRAL Legislative Guide in the cross-border context might be considered.

(b) Inclusion of solvent group members

61. With respect to the participation of solvent group members in a reorganization plan, the Working Group generally agreed that recommendation 238 of part three of the Legislative Guide should be extended to the international context and the scope broadened to encompass more in terms of cooperation and coordination, for example, in the context of the liquidation of group members on a going concern basis.[35]

62. Additional provisions might address how that participation could proceed and how the interests of the solvent group member might be protected. Mention is made in para. 58(c) and (d) above of enabling solvent group members involved in a group reorganization to appoint a representative that might, for example, participate in a committee of representatives of both insolvent and solvent group members to facilitate coordination, work with creditors, negotiate reorganization plans, coordinate treatment of foreign creditors' claims in the main proceedings, and discuss post-commencement finance. Provisions addressing cooperation between courts and insolvency representatives and between insolvency representatives (recommendations 240-250) might be extended to include representatives of those solvent group members, who might be given standing in the insolvency proceedings concerning group members, to the extent considered appropriate, to protect the interests of the solvent group member participating in any group-wide solution.

63. One area of particular concern to solvent group members would be ensuring the confidentiality of commercially sensitive information, particularly in the context of any disclosure statements provided to support a group reorganization plan. Some of the measures taken to ensure the protection of creditors of insolvent group members might also be relevant to the creditors of participating solvent group members, although consideration and protection of those creditors' interests should be taken into account in the decision to participate in the group insolvency proceedings in the first instance.

[35] Ibid., paras. 24-25.