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## **Insolvency Law**

### **Facilitating the cross-border insolvency of multinational enterprise groups: revised draft legislative provisions**

**Note by the Secretariat**

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## I. 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<sup>1</sup> 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. The Working Group considered this topic at its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2015) sessions.

2. This note by the Secretariat implements the revisions to draft articles 1-7 of the text set forth in A/CN.9/WG.V/WP.128 that were requested by the Working Group at its forty-seventh session (A/CN.9/835, paras. 23-46). The notes to the revisions indicate the origin of the revisions and include some observations by the Secretariat on drafting and substance.

## II. Draft legislative provisions on the cross-border insolvency of enterprise groups

### Article 2. Definitions

#### A. Draft provisions

For the purposes of these provisions:

(a)-(g) *(as set forth in A/CN.9/WG.V/WP.128)*

(h) “Foreign group proceeding” means

*Variant 1 (as set forth in A/CN.9/WG.V/WP.128)*

a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor that is a member of an enterprise group are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation in [the context of] an enterprise group insolvency solution;<sup>2</sup>

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 326.

<sup>2</sup> Based on Model Law, art. 2, subpara. (a).

*Variant 2*

[a collective judicial or administrative proceeding, including an interim proceeding, commenced pursuant to a law relating to insolvency in a foreign State that is the centre of main interests of at least one member of an enterprise group and in which an enterprise group insolvency solution (of which the foreign group proceeding is a necessary and integral part), is being developed and coordinated];

- (i) “Enterprise group insolvency solution” means

*Variant 1 (as set forth in A/CN.9/WG.V/WP.128)*

a proposal for coordinated reorganization, sale as a going concern or liquidation (of the whole or part of the business or assets) of two or more members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members. An enterprise group insolvency solution may be coordinated through a proceeding in a State that is the centre of main interests of at least one enterprise group member;

*Variant 2*

[*First sentence remains the same as in variant 1*]. [An enterprise group insolvency solution shall be coordinated through one or more [foreign group] proceeding[, each commenced in a State that is the centre of main interests of at least one enterprise group member and each of which is a necessary and integral part of that solution]];

**B. Notes***Subparagraph (h) — foreign group proceeding*

1. Variant 2 of subparagraph (h) reflects a proposal made at the forty-seventh session (A/CN.9/835, para. 36). The rationale of the revision was to focus on recognition of the coordinating proceeding; proceedings pending for individual group members could be recognized under the Model Law and it was suggested that no further provisions were required for that purpose.

*Subparagraph (i) — enterprise group insolvency solution*

2. Variant 2 of subparagraph (i) reflects a proposal made at the forty-seventh session (A/CN.9/835, para. 36). As noted above in paragraph 1, the rationale of the revision was to focus on recognition of the coordinating proceeding; proceedings pending for individual group members could be recognized under the Model Law and no further provisions were required for that purpose. While it was suggested that subparagraphs (h) and (i) should both contain the same elements, as presently drafted there is no connection between foreign group proceeding and an enterprise group insolvency solution and the definitions are somewhat complex. A simpler drafting solution might be to refer in subparagraph (i) to an enterprise group solution being coordinated through a foreign group proceeding, and rely on the definition of a foreign group proceeding to contain the elements of COMI and the “necessary and integral” connection between the foreign group proceeding and the group solution.

### **Article 3. Recognition of a foreign group proceeding<sup>3</sup>**

#### **A. Draft provisions**

1. A foreign group member representative<sup>4</sup> may apply to the court for recognition of a foreign group proceeding.
2. An application for recognition shall be accompanied by:
  - (a) A certified copy of the decision commencing the foreign group proceeding and appointing the foreign group member representative; or
  - (b) A certificate from the foreign court affirming the existence of the foreign group proceeding and of the appointment of the enterprise group member representative; or
  - (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign group proceeding and of the appointment of the foreign group member representative.
3. An application for recognition shall also be accompanied by:
  - (a) Evidence that [each group member sought to be represented in [a foreign group proceeding] [an enterprise group insolvency solution] has agreed to participate in that [proceeding] [solution]. Where such a group member is subject to insolvency proceedings in the court of its centre of main interests, evidence shall be procured that that court has not prohibited participation of that group member in the [foreign group proceeding] [enterprise group insolvency solution];]
  - [(b) A statement identifying all foreign proceedings commenced in respect of enterprise group members participating in the [foreign group proceeding] [enterprise group insolvency solution] that are known to the foreign group member representative.]
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

#### **B. Notes**

1. At the forty-seventh session, various proposals were made for amendments to paragraph 3 (A/CN.9/835, paras. 32-35). Since one of the proposals (A/CN.9/835, para. 33) was to move the substantive elements of draft article 3, subparagraphs 3 (a) to (c) to draft article 5, those subparagraphs are now set forth in draft article 5, subparagraphs 1 (g) to (i) below. Amendments proposed to those subparagraphs are reflected in draft article 5.
2. A proposal to add a new subparagraph (d) to draft article 3, paragraph 3 (A/CN.9/835, para. 35) is reflected as a new subparagraph (a). It might be noted that the draft text proposed at the forty-seventh session refers to “participation in a foreign group proceeding”, as if that type of proceeding related to multiple group members. However, since the definition of “foreign group proceeding” refers to a

<sup>3</sup> Ibid., art. 15.

<sup>4</sup> As appropriate, the following articles that refer to the foreign group member representative could also apply to an enterprise group committee representative, where such a committee was formed.

proceeding relating to a single group member, it may be more appropriate in subparagraphs (a) and (b) to use the words “enterprise group insolvency solution” which have been included in square brackets.

3. A proposal to add to draft article 3 a provision along the lines of article 15, paragraph 3 of the Model Law (A/CN.9/835, para. 33) is reflected in draft article 3, subparagraph 3 (b).

#### **Article 4. Presumptions concerning recognition<sup>5</sup>**

##### **Notes**

On the basis that the draft text is being developed as an addendum to the Model Law, it was suggested draft article 4 was not required (A/CN.9/835, para. 37) and accordingly it is not repeated in this draft.

#### **Article 5. Decision to recognize a foreign group proceeding<sup>6</sup>**

##### **A. Draft provisions**

1. [Subject to any applicable public policy exception,]<sup>7</sup> a foreign group proceeding shall be recognized if:

(a) [deleted];

(b) [deleted];

(c) The application meets the requirements of article 3, paragraph 2;

(d) The application has been submitted to the court referred to in article ...;<sup>8</sup>

(e) [deleted];

[(f) The foreign group proceeding was commenced on the basis of the centre of main interests or establishment of the foreign group member or (if permissible under the laws of the enacting State) any other basis, including the presence of assets of the foreign group member or voluntary submission by the foreign group member to the jurisdiction of the court of the foreign State];

[(g) An enterprise group insolvency solution is being developed for the whole or a part of the enterprise group;<sup>9</sup>

(h) There is a reasonable prospect of developing an enterprise group insolvency solution; and

(i) The foreign group proceeding is [a necessary and integral part of] [is participating in] the enterprise group insolvency solution.]

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<sup>5</sup> Model Law, art. 16.

<sup>6</sup> Model Law, art. 17.

<sup>7</sup> It may be appropriate to include in the draft text an article along the lines of art. 6 of the Model Law.

<sup>8</sup> It may be appropriate to include in the draft text an article along the lines of art. 4 of the Model Law.

<sup>9</sup> Details of the evidence required to satisfy these requirements could be developed as substantive provisions or included in any commentary or guide to enactment accompanying the text.

[1*bis*. The foreign group proceeding shall be recognized:

(a) As a foreign main group proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) As a foreign non-main group proceeding if the debtor has an establishment in the foreign State within the meaning of article 2, subparagraph (f) of the Model Law.]

2. An application for recognition of a foreign group proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the foreign group member representative shall inform the court of changes in the status of the foreign group proceeding[, the status of the enterprise group solution] or in the status of their own appointment occurring after the application for recognition is made.<sup>10</sup>

## B. Notes

### *Paragraph 1*

1. Subparagraphs 1 (a) and (b) of draft article 5 have been deleted following a suggestion at the forty-seventh session that they were not required as the issues they addressed were covered by the proposed revision to the definition of “foreign group proceeding” (A/CN.9/835, para. 38).

2. As suggested at the forty-seventh session, a new subparagraph 1 (f) has been inserted in draft article 5, paragraph 1 (A/CN.9/835, para. 38). Although receiving some support, reservations were expressed with respect to the reference to presence of assets as a basis for commencement or recognition of insolvency proceedings. It might be noted that presence of assets is not recommended in the Legislative Guide as a basis for commencement of proceedings (see footnote to Legislative Guide recommendation 7). It might also be noted that the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency discusses use of the “presence of assets” standard in the context of article 28 and commencement of local proceedings after recognition of a foreign main proceeding (paras. 224-227). Adoption of a wider basis for jurisdiction (i.e. “or any other basis”) might require the definitions of this draft text to be reconsidered.

3. As suggested at the forty-seventh session, the substantive elements of draft article 3, paragraph 3 (i.e. subparagraphs (a) to (c)) have been moved to draft article 5 (A/CN.9/835, para. 33). They are now reflected in subparagraphs 1 (g) to (i) of draft article 5 and have been revised as proposed. The content of the previous draft of subparagraph (e) would no longer be relevant and has been deleted.

### *Paragraph 1bis*

4. This paragraph reflects a suggestion at the forty-seventh session (A/CN.9/835, para. 38) to include a new paragraph specifying recognition as either main or

<sup>10</sup> Based on the Model Law, art. 18.

non-main proceedings, consistent with article 17, subparagraphs 2 (a) and (b) of the Model Law.

5. The need for paragraph 1*bis* may depend on whether the draft text is to be an addendum to the Model Law or free-standing. Moreover, if the regime is to include recognition as a non-main proceeding, the definitions in draft article 2 might need to be reconsidered.

*Paragraph 4*

6. This paragraph reflects a suggestion at the forty-seventh session (A/CN.9/835, para. 38) to include a reference to changes in the status of the group insolvency solution.

**Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding<sup>11</sup>**

**A. Draft provisions**

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign group member representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a foreign group proceeding or the interests of the creditors, grant relief of a provisional nature, including:

(a) [Where permitted by relevant [procedural] laws,] staying execution against the enterprise group member's assets;

(b) [Where permitted by relevant [procedural] laws,] staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration of all or part of the enterprise group member's assets located in this State to the foreign group member representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

[(c)*bis* Entrusting the realization of all or part of the enterprise group member's assets located in this State to the foreign group member representative or another person designated by the court in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy];

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements;

(e) Any relief mentioned in article 7, paragraph 1.

2. [Insert provisions of the enacting State relating to notice.]

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<sup>11</sup> Based on the Model Law, art. 19.



3. Unless extended under article 7, subparagraph 1 (g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [foreign group proceeding] [group insolvency solution].

## **B. Notes**

### *Subparagraphs 1 (a) and (b)*

1. Following a suggestion made at the forty-seventh session to accommodate situations in which it might be problematic for the court to stay execution, or commencement or continuation of insolvency proceedings, subparagraphs 1 (a) and (b) refer to what is permitted under applicable law (A/CN.9/835, para. 45); the Working Group may wish to consider whether a specific reference to “procedural” law is required. The same amendment has been made to draft article 7, subparagraphs 1 (a) and (b).

### *Subparagraph 1 (c)bis*

2. Subparagraph (c)bis reflects a proposal at the forty-seventh session to treat administration and realization of assets separately (A/CN.9/835, para. 43). The same revision is also reflected in draft article 7, subparagraph 1(a). The Working Group may wish to consider whether a distinction should be made between realization of some or substantially all of the debtor’s assets.

## **Article 7. Relief that may be granted upon recognition of a foreign group proceeding<sup>12</sup>**

### **A. Draft provisions**

1. Upon recognition of a foreign group proceeding, where necessary to protect the assets of the enterprise group member or the interests of creditors and facilitate the implementation of a group insolvency solution, the court may, at the request of the foreign group member representative, grant any appropriate relief, including:

(a) [Where permitted by relevant [procedural] laws], staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;

(b) [Where permitted by relevant [procedural] laws,] staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member to enable a group insolvency solution to be developed;

(c) Staying execution against the assets of the enterprise group member;

(d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;

<sup>12</sup> This article is based upon arts. 20 and 21 of the Model Law, with some additions.

(e) Entrusting the administration of all or part of the assets of the enterprise group member located in this State to the enterprise group member representative or another person designated by the court;

[(e)*bis* Entrusting the realization of all or part of the assets of the enterprise group member located in this State to the enterprise group member representative or another person designated by the court;]

(f) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the enterprise group member;

(g) Extending any provisional relief granted;

(h) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution and authorizing the continued provision of finance under those funding arrangements where the funding entity is located in this State;

(i) Subject to article 8, approving treatment in the foreign group proceeding of the claims of creditors located in this State; or

(j) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a foreign group proceeding the court may, at the request of the foreign group member representative, entrust the distribution of all or part of the assets of the enterprise group member located in this State to the foreign group member representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

## **B. Notes**

Draft article 7 has been revised to be consistent with draft article 6 as indicated in the notes to draft article 6.

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