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Legislative Guide on insolvency Law
Part three: Treatment of enterprise groups in insolvency

Note by the Secretariat*

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* This note is submitted two weeks less than the required ten weeks prior to the start of the meeting because of the need to complete the related document, A/CN.9/WG.V/WP.86 on cross-border cooperation and coordination, and finalize revision of this document.

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I. Introduction

1. At its thirty-fifth session (17-21 November 2008), the Working Group considered various aspects of the international treatment of enterprise groups in insolvency and requested the Secretariat to prepare draft recommendations on a number of those issues: use of the presumption in article 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) to determine the centre of a group for purposes of coordination of cross-border proceedings; coordination and cooperation in cross-border proceedings concerning enterprise groups; use of the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings (the draft Notes); and appointment of a single insolvency representative to administer proceedings in different States concerning members of the same enterprise group.

2. As requested, draft recommendations on those topics are included below to facilitate discussion by the Working Group. It is not intended that those recommendations would in any way substitute for adoption of the Model Law, since the focus of that text is upon facilitating coordination of cross-border proceedings with respect to an individual debtor rather than an enterprise group. Although noting the difference between legislative recommendations and a model law, the Working Group may nevertheless wish to adopt the same working method used with respect to the Legislative Guide and its application to enterprise groups. That might involve considering first, how the articles of the Model Law might apply to an enterprise group and if not, what additional provisions might be required to facilitate coordination of proceedings concerning enterprise groups and secondly, the form of legislative text that might be used to achieve that goal.

II. Facilitating coordination of multiple proceedings with respect to group members through the controlling member of the group

A. Background

3. There has been much discussion recently of applying the concept of centre of main interests (COMI) of an individual debtor to the enterprise group with varying levels of objectives, including commencing insolvency proceedings for all insolvent members of the group, wherever located, in the COMI jurisdiction to facilitating coordination of those proceedings through the COMI. The concept is used in individual cases to determine what might be the location of main proceedings for the purposes of the Model Law and the European Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), but it does not have universal application as a concept and is only recognized by States that have adopted or are subject to either or both of those instruments. Previous working papers have noted the difficulties of determining the COMI and, in particular, some of the issues associated with determining the COMI with respect to enterprise groups (see A/CN.9/WG.V/WP.82/Add.4, paras. 3-15; A/CN.9/WG.V/WP.76/Add.2, paras. 2-17; A/CN.9/WG.V/WP.74/Add.2, paras. 6-12).

4. At its thirty-fifth session, the Working Group generally agreed that it would be difficult to reach a definition of the COMI of an enterprise group that could be used, for example, to limit the commencement of parallel proceedings or simplify the number of laws that might apply to insolvency proceedings commenced in different States with respect to members of the same group (A/CN.9/666, paras. 26-27). It would also be difficult to use the COMI of a group to apply the recognition regime of the Model Law to the enterprise group. Other chapters of the Model Law would be difficult to extend to enterprise groups as such, but may have limited application where the centre of main interests of some or all of the individual members of the same group is determined to be in the same State. There are examples of cases where the court has found this situation to exist with respect to an international enterprise group.

B. Issues for consideration

1. Objectives of determining the coordination centre

5. The Working Group proposed a different approach that would focus upon identifying the member that could be said to control the group (within the meaning of control in the definition of enterprise group – see A/CN.9/WG.V/WP.85, glossary (a)) and through which coordination of multiple insolvency proceedings with respect to members of the same group might be facilitated.[1] The term "coordination centre" is used to refer to that group member in this note, but other terms might also be adopted. Some of the basic objectives of identifying a coordination centre for the enterprise group might be:

(a) To facilitate coordination of multiple proceedings with respect to enterprise group members in order to streamline administration, expedite proceedings and achieve greater efficiency and cost savings;

(b) To encourage and provide authorization for cooperation between the courts and insolvency representatives involved;

(c) To facilitate exchange of information as regards claims, assets and security interests;

(d) To facilitate better realization of the assets of the group, whether through liquidation or reorganization; and

(e) To coordinate raising and provision of post-commencement finance across the group.

6. Whatever factors might be used to identify that group member, it is intended, as noted by the Working Group, that that group member would be regarded only as a first among equals that could lead the coordination and cooperation. That group member would not have additional powers with respect to conduct or management of the proceedings (A/CN.9/666, para. 31). The Working Group did not go on to

[1] The Working Group may wish to note Principle 1 of the IBA Committee J Cross-Border Insolvency Concordat, adopted in 1996, which recommends that "If an entity or individual with cross-border connections is the subject of an insolvency proceeding, a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to such entity or individual."

consider whether that coordination would be initiated and led by the court responsible for conduct of proceedings with respect to the controlling member (where the court performs that function) or the relevant insolvency representative (see below, draft recommendation 15).

2. Factors relevant to identifying the controlling group member

7. With regard to identification of that group member, the Working Group noted that the rebuttable presumption set forth in article 16 (3) of the Model Law might provide inspiration. The general approach of such a recommendation would be to facilitate identification of a coordinating member and encourage widespread recognition of the party identified, not to suggest that that centre, once identified, should automatically be recognized in every State (A/CN.9/666, para. 31). However, broad recognition and acceptance of such an approach would facilitate coordination of cross-border proceedings. Draft recommendation 1 is based upon article 16 (3) of the Model Law.

8. The Working Group further noted that the factors set forth in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4 might be relevant to rebutting that presumption (A/CN.9/666, para. 32) and should be considered collectively. Those factors are set forth in draft recommendation 2 below. However, the Working Group may wish to reconsider the appropriateness of those factors to determining which group member might be said to "control" the group. Those factors, while generally accepted as relevant to determining the place in which an individual debtor can be said to conduct its main activities, are not all relevant to assessing issues of control in an enterprise group context. Although definitions of what constitutes control in the group context varies from State to State and depends largely upon the purpose for which the definition is used, some of the factors commonly associated with the concept are discussed in A/CN.9/WG.V/WP.74, paras. 35-38 and may include:

(a) The holding, whether directly or indirectly, of a specified percentage of capital or votes of group members;

(b) The ability to determine financial and operating policy and decision-making of group members;

(c) The ability to appoint or remove all or a majority of the directors or governing officials of group members;

(d) The ability to cast or regulate the casting of, a majority of the votes that are likely to be cast at a general meeting of a group member, irrespective of whether that capacity arises through shares or options.

9. Information that may be relevant to consideration of these factors might include: the group member's incorporation documents; details about the group member's shareholding; information relating to substantive strategic decisions of the group member; internal and external management agreements; details of bank accounts and their administration and authorized signatories; and information relating to employees.

3. Defining the extent of the enterprise group

10. A preliminary issue that might need to be considered relates to the extent of the enterprise group as such for the purposes of determining the coordination centre.

It may be important to know which enterprises, both solvent and insolvent, may be considered to be group members and how different laws with different definitions with respect to what might constitute a group in different States will be applied. If a coordination centre can be identified, it will need to know which insolvency proceedings with respect to which enterprises it will be able to coordinate.

4. Responsibility for making the determination

11. Another issue might be allocating the responsibility for determining which group member is the controlling member for the purposes contemplated. It might be the court or, where the court does not play a supervising role in the insolvency proceedings, the insolvency representative or a debtor-in-possession. If it were to be the court, which court would have jurisdiction to identify the controlling member? One possibility might be the court that receives the first application for commencement of insolvency proceedings with respect to one or more enterprises that could be considered to be members of a group. A second possibility might require that decision to be made following coordination between a number of courts that have received applications with respect to group members. Where the first application is made in the jurisdiction of the parent of the enterprise group, the solution may be relatively straightforward. Where, however, the first application is made with respect to a member lower in the group structure, the court may be faced with a more difficult choice. Once identified, a related issue might be how to encourage other jurisdictions to recognize that group member as the coordination centre and facilitate it in carrying out its task.

12. An additional issue to be considered relates to the powers the court or the insolvency representative may require in order to lead the coordination. This question may, in part, be answered by provisions along the lines of Chapter IV of the Model Law, which forms the basis of the draft recommendations proposed below with respect to coordination and cooperation.

5. Multiple controlling group members

13. A further issue relates to the number of members that may be identified as controlling a group. In that regard, it may be necessary to bear in mind that in many diverse groups there may not be a single controlling enterprise, but rather a number of different sub-groups or distinct business units. What might be required to facilitate cross-border coordination in that case is an enterprise sufficiently high up the organizational structure of the group to coordinate the proceedings within the discrete unit or a discrete, but sufficiently large, number of group members that might be reorganized as a stand-alone unit. On that basis, a number of coordinating centres might be identified in large enterprise groups.

6. Recommendations

Identifying the coordination centre of an enterprise group

(1) The insolvency law may specify that, in the absence of proof to the contrary, the registered office of the group member controlling the enterprise group is presumed to be the coordination centre of the enterprise group for the purpose of leading the coordination of insolvency proceedings with respect to group members in different States.

(2) The insolvency law should specify that the following factors [may] [should] be relevant to rebut the presumption in recommendation 1:

(a) The nature or extent of any business activity conducted at the location of the registered office;

(b) The location of the employees, managers, company assets and administration of the group member, including its books, records and bank accounts;

(c) The location of the majority of the group member's creditors or of a majority of the creditors who would be affected by the case;

(d) The extent of the group member's independence with respect to financial, management and policy decision-making;

(e) The law applicable to most disputes, to financial arrangements between the group members, including capitalization and accountancy services;

(f) The division of responsibility with respect to provision of technical and legal documentation and signature of contracts; and

(g) The location where design, marketing, pricing, delivery of products and office functions are conducted.

III. Facilitating cooperation and communication

A. Background

14. Chapter IV of the Model Law focuses on coordination and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, but its focus on individual debtors means that it has limited application to enterprise groups. At its thirty-fifth session, the Working Group noted, in discussing international issues, that the interpretation of those parts of the Model Law on coordination and cooperation might be expanded to apply to enterprise groups (A/CN.9/666, para. 63).

15. The Working Group may wish to consider whether that interpretation might be achieved through a series of recommendations extending articles 25 and 26 of the Model Law to enterprise groups and expanding upon the forms of cooperation outlined in article 27. In considering that issue, the Working Group may wish to consider, as noted above in paragraph 2, whether a form of legislative text other than recommendations might be considered or whether some other form of interpretative instrument could be used.

16. Draft recommendations 3-6 below are based upon articles 25 and 26 of the Model Law, with draft recommendations 3 and 4 focusing on authorizing cooperation to the maximum extent possible, and draft recommendations 5 and 6 addressing communication. One issue the Working Group may wish to consider is whether recommendations 5 and 6 should be limited to a particular group member or apply more generally to group members subject to insolvency proceedings. For example, insolvency representative A may be appointed in State A with respect to group member A. Group member A may have assets in State B, where several other group members, B, C and D are subject to insolvency proceedings. Can insolvency

representative A communicate with the court of State B and the insolvency representatives of B, C and D with respect to issues concerning group member A, as well as with respect to B, C and D in so far as they are relevant to the insolvency of A and the reorganization of the group of which they are all members? Would insolvency representative A be entitled to obtain that information and, if so, would draft recommendations 4 and 6 be sufficient for that purpose or would that issue need to be addressed more specifically?

17. Draft recommendations 7-13 expand upon cooperation to the maximum extent possible between courts, courts and insolvency representatives and insolvency representatives. They draw upon draft recommendation 234 concerning domestic enterprise groups, as well as other sources including the draft Notes, the Guidelines Applicable to Court-to-Court Communications in Cross-border Cases[2] and the European Communication and Cooperation Guidelines for Cross-Border Insolvency.[3]

B. Recommendations

Cooperation between the court and foreign courts or foreign representatives

(Model Law article 25.1)

(3) The insolvency law should authorize the court that is competent with respect to insolvency proceedings concerning an enterprise group member to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the insolvency representative or other person appointed in this State, to facilitate coordination of those proceedings and proceedings commenced in other States with respect to that enterprise group.

Cooperation between the insolvency representative and foreign courts or foreign representatives

(Model Law article 26.1)

(4) The insolvency law should authorize the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member in this State, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts or foreign representatives to facilitate coordination of those proceedings and proceedings commenced in other States with respect to members of that enterprise group.

Direct communication between the court and foreign courts or foreign representatives

(Model Law articles 25.2 and 26.2)

(5) The insolvency law should authorize the court that is competent with respect to insolvency proceedings concerning an enterprise group member to communicate directly with, or to request information or assistance directly from, foreign courts or

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[2] Published by the American Law Institute (2000) and adopted by the International Insolvency Institute.

[3] Prepared by INSOL Europe, Academic Wing (2007).

foreign representatives with respect to those proceedings and proceedings commenced in other States with respect to members of that enterprise group.

(6) The insolvency law should authorize an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member in this State, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives with respect to those proceedings and proceedings commenced in other States with respect to that enterprise group.

Forms of cooperation and communication between courts [and between courts and foreign representatives]

(7) To the extent permitted by applicable law, cooperation to the maximum extent possible between the courts [and between courts and foreign representatives] may be implemented by any appropriate means, including:

(a) Provision to the foreign court [or the foreign representative] of copies of documents issued by the court concerning the enterprise group members subject to insolvency proceedings, including formal orders, judgements, and transcripts of proceedings;

(b) Provision to the foreign court [or foreign representative] of copies of documents that have been or are to be filed with the court concerning enterprise group members; and

(c) Participation in two-way communications with the foreign court [or foreign representative] by telephone, videoconference or other electronic means.

Safeguards

(8) The [insolvency] law should specify that communication between the courts [and between courts and foreign representatives] should be subject to the following conditions:

(a) The time, place and manner of communication should be agreed between the courts [or between the courts and foreign representatives];

(b) Notice of any proposed communication should be provided to affected parties in all relevant States in accordance with applicable law and in the manner considered appropriate by the courts;

(c) Affected parties or their representatives, as appropriate, should be entitled to participate in person during the communication, unless otherwise agreed by the courts;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication, filed as part of the record of the proceedings and made available to both court and to representatives of parties in both courts; and

(e) Communications between the courts [and between the courts and foreign representatives] should be treated as confidential to the extent considered appropriate by the courts and in accordance with applicable law.

(9) The insolvency law should specify that communication in accordance with these recommendations should not:

(a) Constitute a compromise or waiver by the court of any powers, responsibilities or authority;

(b) Constitute a substantive determination of any matter in controversy before the court or the foreign court;

(c) Constitute a waiver by any of the parties of any of their substantive rights and claims; or

(d) Diminish the effect of any of the orders made by the court or the foreign court.

Joint hearings

(10) The insolvency law may authorize the court to conduct a joint hearing with a foreign court.[4]

Forms of cooperation and communication between insolvency representatives

(Enterprise groups, draft recommendation 234) [see A/CN.9/WG.V/WP.85]

(11) To the extent permitted by law, cooperation to the maximum extent possible between insolvency representatives should be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning the enterprise group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information. Provision of information may include provision of copies of documents at reasonable cost on request;

(b) Use of agreements of the kind referred to in the UNCITRAL Notes on coordination, cooperation and communication in cross-border insolvency proceedings [see draft recommendations 14 and 15 below];

(c) To the extent permitted by law, division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or leading role;

(d) Coordination with respect to proposal and negotiation of coordinated reorganization plans, communication with creditors and meetings of creditors; and

(e) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; submission and admission of claims; and distributions to creditors.

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[4] Where joint hearings are permitted, they may be subject to certain conditions that safeguard the rights of parties and the jurisdiction of each court. Those conditions might address the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used so that the courts can hear each other; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to other courts; and limitations of the jurisdiction of each court to the parties appearing before it.

(12) The insolvency law should authorize insolvency representatives to communicate with each other as soon as they are appointed. Any insolvency representative may take the initiative to start or continue communication with other insolvency representatives and insolvency representatives may determine the language in which communications between them will take place.

IV. Use of cross-border agreements

A. Background

18. At its thirty-fifth session, the Working Group agreed that cross-border agreements are an important means of coordinating cross-border proceedings with respect to members of an enterprise group and that a recommendation could be included to encourage legislators and courts to draw inspiration from the draft Notes (see A/CN.9/666, para. 38) and promote the use of those agreements. Those States that have enacted article 27 of the Model Law have already recognized that such agreements are one means by which the cooperation envisaged in articles 25 and 26 might be implemented. However, not all States enacting provision based on the Model Law have included article 27 and familiarity and experience with the use and negotiation of such agreements is very limited. Moreover, the Model Law does not provide specific authorization for insolvency representatives or other parties or the court to enter into such agreements.

B. Recommendations

Authority to enter into cross-border agreements

(13) The insolvency law should authorize the insolvency representatives and other parties in interest to enter into and, to the extent permitted or required by law, seek approval [by the courts] of cross-border agreements to facilitate coordination of insolvency proceedings with respect to two or more enterprise group members in different States.

Approval or implementation of cross-border agreements

(14) The insolvency law should authorize the courts to approve or implement cross-border agreements to facilitate coordination of the insolvency proceedings with respect to two or more enterprise group members in different States.

V. Facilitating coordination – the insolvency representative

A. Background

19. The issue of promoting coordination may also be approached via the insolvency representative, by facilitating not only communication and cooperation but also, for example, the appointment of the same insolvency representative in multiple proceedings affecting members of the same group in different States where that person (whether natural or legal) meets applicable local requirements. Where

such a person could be appointed, they would be subject to the local law of the States in which they were appointed. Although acknowledging potential difficulties with respect to the availability of such competence, the Working Group noted at its thirty-fifth session that such an approach might be possible (A/CN.9/666, para. 105). Draft recommendation 230 on domestic groups could be extended to that effect. The appointment could be of a natural person qualified to act in different States or legal person, where that legal person had appropriately qualified persons who could serve as insolvency representatives in a number of different States. Although the availability of appropriately qualified persons might generally be limited, there may be regions where it is more common or the globalization of trade and services may make it increasingly possible. Where such an approach was adopted, provisions to avoid potential conflicts of interest along the lines of draft recommendation 231 may need to be considered.

20. The following recommendations are proposed for consideration by the Working Group.

B. Recommendations

Appointment of the same insolvency representative

(15) The insolvency law should authorize the court to coordinate with foreign courts with respect to the appointment of the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States. To the extent required by the [insolvency] law, the insolvency representative would be subject to the supervision of the appointing court.