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Insolvency Law: possible future work

Addendum

Comments by the International Bar Association respecting proposals to consider an international convention and/or Model Law on Cross-border Enterprise Group Insolvency*

1. At the 37th session of the United Nations Commission on International Trade Law Working Group V (Vienna, 2009), the Working Group agreed to discuss at its next session certain proposals for the Working Group's future deliberations,[1] including the following questions:

(a) Should UNCITRAL direct Working Group V to formulate an International Convention on Cross-Border Insolvency Proceedings (the "Convention")?[2]

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* This document was submitted as soon as possible following receipt of the comments.

[1] Working Group V has devoted several sessions to formulating recommendations for a Legislative Guide Annex addressing an array of procedural and substantive legal issues arising in domestic and international contexts in cross-border enterprise group insolvency cases. Working Group V's earlier work product culminated in the UNCITRAL Model Law on Cross-Border Insolvency and current Legislative Guide, which addressed insolvency cases of single entity debtors. Part three of the Legislative Guide is a first step toward harmonizing legal rules governing insolvency proceedings of cross-border enterprise groups.

[2] At Working Group V's 37th Session, the Union Internationale des Avocats ("UIA") submitted CRP.3, proposing a Convention on international insolvency law, addressing: granting access to foreign representatives; recognition of foreign insolvency proceedings; cooperation & communication between insolvency representatives & courts; and other potential issues such as "direct competence" ('convention double") and applicable Law. [*See also document A/CN.9/WG.V/WP.93, paras. 1, 4 and 5.*]

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(b) Should UNCITRAL direct Working Group V to formulate a Model Law on Enterprise Group Insolvency Proceedings (the "Enterprise Group Model Law")?[3]

2. The International Bar Association Section on Insolvency, Restructuring and Creditors' Rights submits the following summary comments in support of a conditional affirmative response to the foregoing questions.

A. Convention on Cross-Border Insolvency Proceedings

Working Group V should recommend provisions for a Convention on Cross-Border Insolvency Proceedings, covering topics treated in the recommendations of the draft part three of the Legislative Guide, chapter II (International). A convention enforceable on the basis of reciprocity would establish a reliable international framework affording coordinated, consistent administration of cross-border insolvency proceedings, especially those of enterprise groups.

3. The absence of enforceable, reliable, consistent international rules affording coordination, cooperation and communication among courts and between those administering cross-border multi-national enterprise group insolvency proceedings has led to jurisdictional conflicts, wasteful litigation and competition for assets and control by national courts and insolvency administrators. Courts of some nations have bridged the procedural gap by approving ad hoc cross-border protocols.[4]

4. Courts of other nations have been unwilling to do so. A convention on international (procedural) aspects of cross-border insolvency proceedings would address these issues. A chief objective of a convention would be to establish a more consistent, reliable framework than a model law for coordination, cooperation and communication among courts, insolvency administrators and professionals, as well as facilitating joint administration, in cross-border enterprise group insolvency proceedings, which often have a far-reaching impact on the global economy.

1. Comparative Advantages of a Convention

5. The UNCITRAL Model Law on Cross-border Insolvency's limited adoption to date threatens a similar fate for Working Group V's recommendations on enterprise group insolvency in the international context, and merits reconsideration of whether those recommendations should be further incorporated into a convention or model law.[5] Model laws are generally thought to have a better chance of adoption than

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[3] [*See the proposal by the delegation of the United States of America for preparation of a model law or model provisions on selected international insolvency law issues contained in document A/CN.9/WG.V/WP.93/Add.1 and the background for that proposal contained in document A/CN.9/WG.V/WP.93/Add.2.*]

[4] UNCITRAL in July, 2009 adopted Working Group V's Practice Guide on Cross-Border Insolvency Cooperation, which describes in great detail accomplishments to date in international insolvency case protocols.

[5] Before beginning to draft a new Model Law or Convention, the Working Group should undertake a detailed examination of why so few states have enacted the UNCITRAL Model Law on Cross-Border Insolvency. This could provide the Working Group useful information on whether it would be fruitful to propose a Model Law on Enterprise Group Insolvency (or a

conventions, because national legislatures may make modifications when enacting the former, but not the latter.[6] It is possible, however, that a convention would fare at least as well as a model law regulating international aspects of cross-border enterprise group insolvency proceedings.

6. Working Group V has discussed significant differences in various nations' substantive insolvency laws and procedural rules impeding even limited cross-border cooperation and communication in enterprise group cases.[7] Although the UNCITRAL Legislative Guide and Model Law are known to courts and practitioners in many countries, their provisions have not been adopted as often as desired. One reason is that nations hesitate to modify legal rules, cede jurisdiction or grant privileges in a manner, or to an extent, that might not be reciprocated by other nations — and Model Laws do not carry a promise of (nor are their application conditioned on) reciprocity.

7. A Convention binding and effective only between contracting states would address that objection. For example, nations may be unwilling to enact a general principle of insolvency law recognizing foreign insolvency proceedings "on an equal footing" with those of the home jurisdiction for fear that other nations would not do the same. Those states would probably be more willing to grant such recognition in the context of a Convention promising reciprocal action by courts of other contracting nations.

8. A Convention on Cross-Border Insolvency Proceedings should therefore be binding and effective on the basis of reciprocity[8] and should be limited to the international context (i.e., in the enterprise group context, topics treated by part three of the Legislative Guide, chapter II, International).[9] While a convention addressing the domestic recommendations of part three of the Legislative Guide,

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Convention on international aspects of cross-border insolvency proceedings), and, if so, how to increase the probability that these instruments would be widely embraced and enacted/ratified.

[6] Nations may, however, file reservations to certain provisions of conventions. This once-disfavored practice has become more commonly accepted in recent decades.

[7] These differences contribute to the reluctance of many states to promulgate the UNCITRAL Model Law on Cross-border Insolvency.

[8] Such reciprocity provisions are set forth in several widely-ratified Conventions. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Art. 1, par.3 ("When…acceding to this Convention…any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.")

[9] Part three of the Legislative Guide, chapter II (International) is limited to aspects of cross-border enterprise group cases more procedural than substantive, in that they do not provide rights or remedies in adjustment of debts, claims or interests in the debtor-creditor relationship. Those provisions, which would be appropriately treated by an international convention, relate to access to courts and recognition of foreign proceedings, cooperation and communication among and between courts and insolvency representatives, direct communication between courts, foreign courts and insolvency representatives, coordination of hearings, appointment of a single or the same insolvency representative by courts of different national jurisdictions, and authority to enter into — and approval/implementation of — cross-border insolvency agreements.

chapter I is not feasible,[10] a convention limited to matters within the ambit of Part II is realistically achievable and would avoid many of the pitfalls encountered to date in implementing more ambitious, substantively comprehensive regional insolvency conventions.

9. Model laws are enacted as an integral part of a nation's laws — in this case, insolvency law. Some Model Law provisions cannot be enacted because they differ too fundamentally from a legal system's basic norms to be integrated into a nation's substantive law.[11] By contrast, international conventions, while fully binding under, and technically a part of, national law, often create limited exceptions to otherwise applicable national laws (and judicial traditions) as a matter of state contract to address a discrete need for international cooperation. Some inconsistency with otherwise applicable principles of national law is often more acceptable in the context of an international convention calling for compromise by all nations parties when necessary to achieve common objectives.

10. In summary, a Convention binding on the basis of reciprocity would incentivize nations to: (a) bridge differences on access to foreign courts, recognition of foreign proceedings, as well as communication, coordination and cooperation among and between courts, insolvency administrators and practitioners in cross-border insolvency proceedings, including those of enterprise groups; (b) overcome mistrust, including suspicion that foreign courts will unfairly discriminate against nationals of other nations; and (c) compromise jurisdictional and other standards in the knowledge that doing so will yield beneficial compromises in proceedings before courts of foreign states parties to the Convention. This, in turn, would promote wider acceptance of the principles set forth in the Convention.

Working Group V should consider collaborating with the Hague Conference on Private International Law to jointly deliberate upon and propose a Convention on Cross-Border Insolvency Proceedings.[12]

11. A collaboration between UNCITRAL (through Working Group V) and The Hague Conference on Private International Law would unite UNCITRAL's extensive expertise in international trade law (and the benefit of decades of international dialogue and study concerning cross-border insolvency law) with the Hague Conference's expertise drafting private international law conventions.[13] This

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[10] Because the recommendations of Legislative Guide Annex Part I concern rights and remedies fundamental to the adjustment of the creditor-debtor relationship, they raise questions of domestic policy which could, in many cases, involve significant revision of a nation's insolvency law(s). Many Working Group V delegations have contended that there is not sufficient consensus for a convention on these substantive domestic law provisions to be successful.

[11] Model law provisions varying jurisdictional standards or commonly accepted norms of judicial conduct are often contentious. Types of provisions that might be difficult to promulgate as unilateral national law include, for example, those calling for supra-national judicial communication, recognition of foreign insolvency proceedings on an equal footing with domestic proceedings, appointment of the same insolvency representative in different nations' proceedings.

[12] UNCITRAL previously sought assistance of the Hague Conference in drafting commentary and legislative provisions for the UNCITRAL Legislative Guide on Insolvency Law.

[13] Working Group V should not underestimate the need for UNCITRAL's contribution to such a Convention. UNCITRAL's Working Group V has singular cross-border insolvency expertise that

collaboration might involve a joint drafting team composed of secretariats and experts from both organizations. The UNCITRAL Secretariat's guidance on the feasibility of such a joint effort would be essential, considering the Secretariat's prior experience coordinating with The Hague Conference in the context of the UNCITRAL Legislative Guide on Insolvency Law.

B. A Model Law on Enterprise Group Insolvency

12. In addition to its work on a Convention for Cross-Border Insolvency Proceedings, Working Group V should draft a Model Law on Cross-Border Enterprise Group Insolvency.[14] If UNCITRAL proposes a convention on international aspects of enterprise group insolvency proceedings, a model law would still be needed to address issues arising in the domestic context (i.e., those matters treated by part three of the Legislative Guide, chapter I (Domestic Issues)).[15] If UNCITRAL does not propose such a convention, a model law should also contain provisions on matters arising in the international context (i.e., Legislative Guide, part three, chapter II (International)).

13. Governmental commissions and insolvency practitioners have noted the need for greater uniformity in laws governing enterprise group insolvencies. Disparities in national laws governing these proceedings frustrate shared economic and policy objectives of insolvency laws. Key provisions of part three of the Legislative Guide are sufficiently developed to suggest that consensus could be reached on provisions of an Enterprise Group Model Law. UNCITRAL's approval of such a Model Law would itself promote, in the enterprise group context, widely shared rehabilitative and equitable distributive policies undergirding insolvency laws. Enactment of uniform standards governing enterprise group insolvencies in the domestic context will create efficiencies in cross-border proceedings and lead to greater predictability in international financial and commercial transactions and in international corporate governance.

14. Unlike a Convention, a Model Law does not require ratification by a minimum number of states to come into force, and may be modified by national legislatures to address realities of local interest group politics. Political flexibility is necessary to encourage widespread adoption of the recommendations of the Enterprise Group Legislative Guide, part three, chapter I (Domestic Context).

15. As noted above, reciprocity concerns make it unclear whether many nations would unilaterally enact a model law's provisions addressing the international context. Nonetheless, part three of the Legislative Guide, chapter II will help national legislatures "fill the gap" until a Convention comes into force. Even short

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would be helpful to the convention drafting and consensus-building process necessary for widespread ratification.

[14] While it would be very helpful for Working Group V to produce a list of factors relevant to determining an enterprise group's Centre of Main Interests ("COMI"), this might be more appropriately a subject for the Legislative Guide Annex than a Model Law.

[15] Part II of the Legislative Guide Annex would provide nations not ratifying a Convention useful guidance on legislation to harmonize international aspects of cross-border enterprise group insolvency proceedings.

of widespread enactment, those provisions would stand with the UNCITRAL Practice Guide as a useful source of guidance for ad hoc protocols.