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Insolvency Law

Centre of main interests in the context of an enterprise group

Note by the Secretariat

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I. Background

1. At its previous session (November 2012), the Working Group expressed the views that: it was necessary to look at the issue of centre of main interests as it related to enterprise groups because most commercial activity was currently conducted through such groups; the scope of its mandate with respect to centre of main interests as originally approved included centre of main interests in the context of enterprise groups; and that topic should be considered upon completion of the revisions proposed for the Guide to Enactment of the Model Law on Cross-Border Insolvency (A/CN.9/763, paras. 13-14).

2. The Working Group may wish to recall that the scope of its mandate with respect to centre of main interests as originally approved also referred to the possibility of "developing a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention."[1]

II. Summary of previous discussion in the Working Group

3. The Working Group may also wish to recall the working papers prepared for previous sessions that discussed aspects of enterprise groups and centre of main interests in the context of part three of the Legislative Guide on Insolvency Law, namely A/CN.9/WG.V/WP.74/Add.2 (paras. 5-12); A/CN.9/WG.V/WP.76/Add.2 (paras. 2-17); A/CN.9/WG.V/WP.82/Add.4 (paras. 10-15); A/CN.9/WG.V/WP.85/Add.1 (paras. 3-13); A/CN.9/WG.V/WP.99, paras. 55-64; and A/CN.9/738, paras. 36-37.

4. While it is not possible to repeat the material provided in those papers, the Working Group may wish to recall the conclusions it reached as a result of discussing those materials at its thirty-first to thirty-sixth and fortieth sessions.

5. At its thirty-first session, the Working Group concluded (A/CN.9/618, para. 54) that the difficulties of achieving an agreed definition of the centre of main interests of an enterprise group suggested the need to focus on facilitating coordination and cooperation between the various courts in which insolvency proceedings against different members of an enterprise group might be commenced, whilst acknowledging the desirability of avoiding a multiplicity of proceedings in the enterprise group context.

6. At its thirty-second, thirty-third and thirty-fourth sessions, the Working Group had limited discussion of international issues, much of which was confined to attempting to identify a way forward and the manner in which the relevant issues might be discussed.

7. At its thirty-fifth session, the Working Group generally agreed (A/CN.9/666, paras. 26-27) that, although perhaps desirable, it would be difficult to reach a definition of the centre of main interests 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

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[1] See A/CN.9/WG.V/WP.93/Add.1, para. 8 and *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17*, A/65/17, para. 259 (a).

States with respect to members of the same group. One key concern would be the extent to which such a definition would be widely accepted and adopted and voluntarily enforced by the courts affected by it. It also agreed that it would be difficult to use the centre of main interests of a group to apply the recognition regime of the Model Law to the enterprise group as a whole, as opposed to applying it to individual members of that group. The Working Group concluded (A/CN.9/666, para. 32) that: the presumption contained in article 16 (3) of the Model Law was not directly applicable in the context of enterprise groups; providing a rule on the centre of main interests of an enterprise group could be useful to facilitate coordination of multiple insolvency proceedings with respect to group members; and such a rule might establish a rebuttable presumption, along the lines of article 16 (3) of the Model Law, for determining the seat of the controlling group member, with the factors relevant to rebutting such a presumption (which should be considered as a whole) being based upon those set forth in paragraphs 6 and 13 of document A/CN.9/WG.V/WP.82/Add.4.

8. Paragraph 6 identified factors such as the extent of a subsidiary's independence with respect to financial, management and policy decision-making; financial arrangements between parent and subsidiary, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; and the location where design, marketing, pricing, delivery of products and office functions were conducted.

9. Paragraph 13 referred to factors that might be relevant to determining the degree of integration required to establish the seat of the controlling member of a closely integrated group. It was suggested that those factors might include: the extent of group members' independence with respect to financial, management and policy decision-making ("head of the office functions"); financial arrangements between group members, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; the location where design, marketing, pricing, delivery of products and office functions were conducted; and third-party perceptions, in particular those of creditors, concerning that location. Paragraph 15 of the introduction to part three of the Legislative Guide also outlines factors that might be relevant to determining the degree of integration of an enterprise group.

10. At the Working Group's thirty-sixth session, after further consideration of the idea of a coordination centre, the view was expressed (A/CN.9/671, paras. 18-19) that identifying a coordination centre in an enterprise group brought with it a number of the difficulties associated with identifying the centre of main interests of an individual debtor. Those concerned, in particular, identifying the State that should make the decision with respect to the location of the coordination centre and whether that decision could be enforced or at least recognized in other States.

11. Additional concerns related to: ensuring that the function of that centre was procedural and not substantive; ensuring there was sufficient flexibility to take account of individual cases; the need for speed in identifying the coordination centre, which suggested the desirability of avoiding complex criteria; the need to avoid forum shopping; the desirability of identifying the role to be played by the coordinating entity; the desirability of identifying a coordination centre only when

determined to be useful or necessary to achieve global reorganization of a group; and the need to distinguish between the role of courts in coordination and cooperation and that of the coordinating group member. It was noted with respect to the latter point, that the Working Group had not considered, at its previous session, whether coordination should be initiated and led by the court responsible for conduct of the proceedings with respect to the coordinating member or the relevant insolvency representative. It was widely agreed (A/CN.9/671, para. 20) that a decision by one court identifying a coordination centre should not be binding in other States.

12. Although there was some support for retaining a recommendation on establishing the coordination centre for an enterprise group, the Working Group was unable to identify a clear role for such a centre that would add to the more general recommendations on coordination and cooperation between the courts and insolvency representatives that had been agreed should be included in part three of the Legislative Guide on Insolvency Law. Having considered the other draft recommendations of part three, the Working Group returned to the topic of a coordination centre and agreed (A/CN.9/671, para. 23) to delete draft recommendations 1 and 2 (which provided a presumption for identifying the coordination centre), on the basis that the determination of such a centre did not imply any legal consequences because it was non-binding. The Working Group nevertheless recognized the value of one entity having the leading role in the cooperation and agreed to address the importance of having one entity acting as the coordinating member in the commentary.[2] That issue was subsequently addressed in the final version of recommendation 250, which provides that the means of cooperation between insolvency representatives may include one of them taking a coordinating role. The approach ultimately adopted by part three was to focus on fostering cooperation between, and coordination of, cross-border insolvency proceedings concerning two or more members of an enterprise group, building upon the cooperation and coordination provisions of the Model Law (articles 25-27).

13. At its fortieth session, the Working Group concluded (A/CN.9/738, paras. 36-37) that reference should be made, in the revisions relating to certain aspects of centre of main interests to the Guide to Enactment of the Model Law on Cross-Border Insolvency, to part three of the Legislative Guide and the solutions adopted with respect to the treatment of enterprise groups in insolvency,

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[2] The Working Group may wish to note the approach adopted in work to develop principles for coordination of multinational corporate group insolvencies by the International Insolvency Institute (available at www.iiiglobal.org/component/jdownloads/viewcategory/558.html). These principles are intended to apply to an enterprise group with members, operations, assets and employees located in more than one country and where there is unified corporate governance either through common or interlocking shareholding or by contract. The principles focus on determining a “group centre”, being the jurisdiction from which the operations of an integrated multinational enterprise are directed, in order to identify the jurisdiction to which other jurisdictions should defer, to the extent permitted by law, on issues of global asset maximization. Factors to be considered to determine whether the relevant degree of integration is present are those set out in the Legislative Guide and noted above. Guidelines 1-11 deal with notice and standing; communication; coordination and protocols; deferral of certain commencement decisions; and single insolvency representatives. Guidelines 12-22, which deal with identification of the enterprise group centre and its effects, are aspirational and it is noted that these would need to be implemented by legislation.

particularly in the international context. The Working Group has been requested to consider the question of what should be included in that reference in document A/CN.9/WG.V/112, paragraph 9. Beyond that reference, however, and particularly with respect to the concept of the centre of main interests of an enterprise group, it was suggested at the fortieth session that once the Working Group had reached agreement on the factors relevant to identifying the centre of main interests of an individual debtor, it might be possible to consider the group issue further and, in particular, the relevance of those factors in the group context (revisions to the Guide to Enactment of the Model Law on Cross-Border Insolvency, including the factors relevant to the determination of centre of main interests, are contained in document A/CN.9/WG.V/WP.112).

III. Developments in the treatment of enterprise groups in insolvency

14. The Working Group may wish to note that it is uncertain whether existing practice with respect to enterprise groups has developed in any new direction that indicates a solution to the issues already identified in connection with centre of main interests and enterprise groups. Recent practice does suggest, however, the increasing use of coordination and cooperation in ways largely consistent with the recommendations contained in part three of the Legislative Guide to address multiple cross-border proceedings involving members of an enterprise group. Several jurisdictions have enacted legislation based upon part three of the Legislative Guide[3] and it has been referred to as a source of inspiration in the context of the insolvency of large and complex financial institutions (see generally, A/CN.9/WG.V/WP.109) for facilitating cross-border cooperation and communication.

15. The Working Group may also wish to note recent proposals for revision of the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings that are largely consistent with the recommendations of part three. These proposals provide for coordination of insolvency proceedings concerning different members of the same enterprise group by obliging the insolvency representatives and courts involved in the different main proceedings to cooperate and communicate with each other. In addition, the insolvency representatives involved in such proceedings will have the procedural tools to request a stay of the other proceedings and to propose a rescue plan for the group members subject to insolvency proceedings.

16. While a new recital clarifies the circumstances in which the presumption that the centre of main interests of a legal person is located at the place of its registered office can be rebutted (the language of this recital is taken from the *Interedil*[4] decision of the Court of Justice of the European Union), the entity-by-entity approach to centre of main interests of members of an enterprise group has been maintained. However, several modifications are proposed with the aim of improving the efficient administration of the debtor's estate in situations where the debtor has

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[3] Colombia, Decree 1749 of 2011; in early January 2013, the German Ministry of Justice issued a discussion draft on enterprise group insolvency that appears to draw inspiration from part three.

[4] *Interedil Srl, in liquidation*, Case C_396/09, judgement of 20 October 2011.

an establishment in another Member State. The court seised with a request for opening secondary proceedings should be able, if so requested by the insolvency representative in the main proceedings, to refuse the opening or to postpone its decision on opening if those proceedings would not be necessary to protect the interests of local creditors. Moreover, that court is obliged to hear the insolvency representative of the main proceeding before opening the secondary proceeding. The power of the insolvency representative to request the opening of secondary proceedings where this would facilitate the administration of complex cases will not be affected.

IV. Next steps

17. The Working Group may wish to consider how it might approach the question of how to further facilitate the cross-border treatment of enterprise groups in light of the above remarks, taking into consideration the extended mandate of the Working Group as it relates to the development of a possible model law, provisions or a convention on issues of jurisdiction, access and recognition.