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Report of Working Group V (Insolvency Law) on the work of its fifty-fourth session (Vienna, 10–14 December 2018)

Contents

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I. Introduction

A. Enterprise group insolvency

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide). The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898), fifty-first (May 2017) (A/CN.9/903), fifty-second (December 2017) (A/CN.9/931) and fifty-third (May 2018) (A/CN.9/937) sessions and continued its deliberations at the fifty-fourth session.

B. Obligations of directors of enterprise group companies in the period approaching insolvency

2. At its forty-fourth session, the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the *UNCITRAL Legislative Guide on Insolvency Law* could be applied in the enterprise group context and identification of additional issues (e.g., conflicts between a director's duty to its own company and the interests of the group) would be helpful (A/CN.9/798, para. 23). The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835) and forty-ninth (May 2016) (A/CN.9/870) sessions. At its fifty-second session (December 2017) (A/CN.9/931), the Working Group noted the revised text on the obligations of directors of enterprise group companies in the period approaching insolvency as contained in document A/CN.9/WG.V/WP.153 and that the text would be considered further when the work on enterprise groups was nearing completion. That text was considered at the fifty-fourth session of the Working Group.

C. Insolvency of micro, small and medium-sized enterprises

3. At its forty-sixth session (2013), the Commission requested Working Group V to conduct a preliminary examination of issues relevant to the insolvency of micro, small and medium-sized enterprises (MSMEs).[2] At its forty-seventh session (2014), the Commission gave Working Group V a mandate to undertake work on the insolvency of MSMEs as a next priority, following completion of the work on facilitating the cross-border insolvency of multinational enterprise groups and recognition and enforcement of insolvency-related judgments.[3] At its forty-ninth session (2016), the Commission clarified the mandate of Working Group V with

[1] A/CN.9/763, paras. 13–14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259(a)).

[2] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

[3] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.

respect to the insolvency of MSMEs as follows: “Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed.”[4] The Working Group held a preliminary discussion of the topic at its forty-fifth (April 2014) (A/CN.9/803), forty-ninth (May 2016) (A/CN.9/870), fifty-first (May 2017) (A/CN.9/903) and fifty-third (May 2018) (A/CN.9/937) sessions and continued its deliberations at the fifty-fourth session.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-fourth session in Vienna from 10 to 14 December 2018. The session was attended by representatives of the following States Members of the Working Group: Armenia, Austria, Belarus, Brazil, Burundi, Canada, Chile, China, Côte d’Ivoire, Czechia, Denmark, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Mexico, Namibia, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Croatia, Cyprus, Dominican Republic, Finland, Lithuania, Malta, Myanmar, Netherlands, Qatar, Slovakia, Slovenia, South Africa, Sudan, Timor-Leste, Viet Nam and Yemen.

6. The session was also attended by observers from the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: World Bank Group (WB);

(b) *Invited international governmental organizations*: European Investment Bank (EIB), Gulf Cooperation Council (GCC), International Association of Insolvency Regulators (IAIR) and International Institute for the Unification of Private Law (Unidroit);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Center for International Legal Studies (CILS), European Banking Federation (EBF), European Law Institute (ELI), Fondation pour le Droit Continental, Groupe de réflexion sur l’insolvabilité et sa prévention (GRIP 21), INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), International Bar Association (IBA), International Insolvency Institute (III), International Law Institute (ILI), International Swaps and Derivatives Association (ISDA), International Women’s Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA) and New York State Bar Association (NYSBA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit WISITSORA-AT (Thailand)

Rapporteur: Mr. Mustapher NTALE (Uganda)

[4] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.160);

(b) A note by the Secretariat on enterprise group insolvency: draft model law (A/CN.9/WG.V/WP.161);

(c) A note by the Secretariat on enterprise group insolvency: draft guide to enactment (A/CN.9/WG.V/WP.162);

(d) A note by the Secretariat on insolvency of MSMEs: draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.163); and

(e) A note by the Secretariat on obligations of directors of enterprise group companies in the period approaching insolvency (A/CN.9/WG.V/WP.153).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of insolvency topics.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered a draft model law on enterprise group insolvency, an accompanying draft guide to enactment, draft materials on obligations of directors of enterprise group companies in the period approaching insolvency and a draft text on a simplified insolvency regime, on the basis of the documents listed in paragraph 9 above. The deliberations are summarized in chapters IV to VI below. The decisions taken are contained in paragraphs 109–111, 113 and 132 below. An annex to this report reproduces the draft model law on enterprise group insolvency approved by the Working Group at the session (the addition of a new article (see para. 71 below) led to the renumbering of the draft articles and consequential changes in cross-references).

IV. Enterprise group insolvency

A. Consideration of the draft model law (A/CN.9/WG.V/WP.161)

General drafting issues

12. With respect to the general drafting suggestions in paragraphs 3 to 6 of the Introduction to document A/CN.9/WG.V/WP.161, different views were expressed both in support of, and objection to, implementing the drafting suggestions in paragraphs 3 and 4. With respect to the suggestions in paragraphs 5 and 6, it was proposed that they should be considered on a case-by-case basis.

13. After discussion, the Working Group approved the general drafting suggestions on the understanding that any exceptions to them would be considered in the context of the drafting of specific provisions.

14. The Working Group proceeded to review the draft model law, commencing with chapter 2.

Part A. Core provisions

Chapter 2. Cooperation and coordination

General

15. Support was expressed for the suggestion that the chapter should be expanded to cases of cooperation and coordination among courts, insolvency and group representatives within a single State comprised different jurisdictions. The view was shared that the model law would be inflexible if it focused in the enterprise group insolvency context only on cooperation and coordination between domestic courts and domestically appointed insolvency or group representatives on the one hand and foreign courts and insolvency and group representatives on the other hand.

16. Another view was that the focus of the chapter on cross-border cooperation and coordination should be retained and the use of provisions in the domestic context might be explained in the draft guide. A further view was that a broader approach could be followed by inserting an additional clause in the draft model law explaining that the chapter was intended for application to cooperation and coordination among both foreign and domestic courts and representatives. Alternatively, that point could be reflected in the draft guide.

17. The prevailing view that the chapter should be expanded to ensure it applied to cooperation and coordination between domestic courts and domestically appointed representatives on the one hand and foreign courts and representatives on the other hand. It was understood that the draft guide would explain that application and that generic references to courts and representatives in the chapter were not intended to refer only to domestic courts and representatives.

Article 8 [3]. Cooperation and direct communication between a court of this State and foreign courts, [foreign] [insolvency] representatives and a group representative

18. With reference to the drafting suggestion in paragraph 13 of document A/CN.9/WG.V/WP.161, some preference was expressed in favour of variant 2. A suggestion to replace the phrase “to the maximum extent possible” in the paragraph with the words “in accordance with domestic law” did not receive support.

19. The Working Group approved the following text of the draft article:

> **“Article 8. Cooperation and direct communication between a court of this State and other courts, insolvency representatives and any group representative appointed**
>
> 1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.
>
> 2. The court is entitled to communicate directly with, or to request information or assistance directly from, other courts, insolvency representatives or any group representative appointed.”

Article 9 [4]. Cooperation to the maximum extent possible under article 8

20. The Working Group approved the drafting suggestions in paragraph 15 of document A/CN.9/WG.V/WP.161 and agreed to insert in subparagraph (i) the word “and filing” after the word “treatment” and explain in the draft guide that the draft article applied to both domestic and cross-border contexts and to coordination and cooperation in the context of planning proceedings and insolvency proceedings where

there was no planning proceeding. The Secretariat was requested to explain in the draft guide the reference to "body" in subparagraph (e).

21. No support was expressed for a suggestion to redraft subparagraph (j) as follows: "Recognition and treatment of claims filed by creditors of enterprise group members in other jurisdictions". A view was expressed that the deletion of the word "cross-filing" through that suggestion would not accommodate group claims on behalf of the entire estate of the enterprise group.

22. The Working Group approved the following text of the draft article:

"Article 9. Cooperation to the maximum extent possible under article 8

For the purposes of article 8, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with other courts, an insolvency representative or any group representative appointed;

(c) Coordination of the administration and supervision of the affairs of enterprise group members;

(d) Coordination of concurrent insolvency proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval and implementation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(g) Cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication;

(h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

(i) Approval of the treatment and filing of claims between enterprise group members;

(j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

(k) [*The enacting State may wish to list additional forms or examples of cooperation*]."

Article 10 [5]. Limitation of the effect of communication under article 8

23. The Working Group approved the following text of the draft article:

"Article 10. Limitation of the effect of communication under article 8

1. With respect to communication under article 8, a court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

2. Participation by a court in communication pursuant to article 8, paragraph 2, does not imply:

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

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.”

24. In response to a query about subparagraph (f), it was explained that the issue of the jurisdiction of the court would be regulated by domestic law and that the model law, if enacted, would become a part of the domestic law of the enacting States.

Article 11 [6]. Coordination of hearings

25. The Working Group approved the following text of the draft article:

“Article 11. Coordination of hearings

1. A court may conduct a hearing in coordination with another court.

2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.

3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.”

Article 12 [7]. Cooperation and direct communication between a group representative [appointed in this State], [foreign] [insolvency] representatives and foreign courts

26. No objection was raised to the suggestion to delete the words “appointed in this State” in the title of the article.

27. The Working Group approved the following text of the draft article:

“Article 12. Cooperation and direct communication between a group representative, insolvency representatives and courts

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts and insolvency representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts and insolvency representatives of other enterprise group members.”

Article 13 [7 bis]. Cooperation and direct communication between a[n insolvency representative appointed in this State] [[*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State***]], foreign courts, [foreign] [insolvency] representatives [of other group members] and a group representative**

28. The Working Group approved the following text of the draft article:

“Article 13. Cooperation and direct communication between an insolvency representative appointed in this State, other courts, insolvency representatives of other group members and any group representative appointed

1. An insolvency representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the

maximum extent possible with other courts, insolvency representatives of other enterprise group members and any group representative appointed.

2. An insolvency representative appointed in this State is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts, insolvency representatives of other enterprise group members and any group representative appointed."

Article 14. Cooperation to the maximum extent possible under articles 12 and 13

29. In response to the proposal in paragraph 25 of document A/CN.9/WG.V/WP.161, it was suggested that articles 9, subparagraph (f), 14, subparagraph (b), and 15 might be merged by adding the words "and execution" after "negotiation" in subparagraph (b). That proposal did not receive support and the Working Group agreed to retain the three separate provisions dealing with agreements concerning coordination of proceedings as drafted in order to maintain the distinction between encouraging cooperation on the one hand and authority to enter into agreements on the other hand.

30. The Working Group approved the following text of the draft article:

"Article 14. Cooperation to the maximum extent possible under articles 12 and 13

For the purposes of article 12 and article 13, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between an insolvency representative appointed in this State, insolvency representatives of other group members and any group representative appointed;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable."

31. It was agreed that the draft guide would explain that the reference to agreements in subparagraph (b) was not intended to refer only to cross-border cooperation agreements, in the light of the decision made at the current session to expand the scope of the chapter (see para. 17 above).

Article 15 [9]. Authority to enter into agreements concerning the coordination of [insolvency] proceedings

32. Views differed on whether the words "located in different States" and "two or more enterprise group members" should be retained in the draft article. The prevailing view that the phrase "located in different States" should be deleted while the phrase "two or more enterprise group members" should be retained, which would make provisions compliant with changes agreed to be made at the current session to draft articles 9, subparagraph (f), and 14, subparagraph (b) (see para. 20 above).

33. The Working Group approved the following text of the draft article:

“Article 15. Authority to enter into agreements concerning the coordination of insolvency proceedings

An insolvency representative and any group representative appointed may enter into an agreement concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed.”

Article 16 [10]. Appointment of a single or the same insolvency representative

34. The Working Group agreed to replace the reference to “the court” with “a court”, to replace the word “foreign” with “other” and, to ensure consistency with the other articles of chapter 2 already considered, to delete the words “in different States”. The draft guide would explain the application of the article to both domestic and cross-border situations.

35. The Working Group approved the following text of the draft article:

“Article 16. Appointment of a single or the same insolvency representative

A court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group.”

Article 17 [11]. Participation by enterprise group members in a[n insolvency] proceeding [commenced in this State] [under [*identify laws of the enacting State relating to insolvency***]]**

36. A suggestion was made to add the words “the law or” before the words “a court” in paragraph 2 or that the draft guide should explain that the foreign law might prohibit an enterprise group member from participating in a planning proceeding in another State. Another suggestion was to add the words “the decision by” before the words “a court”. Yet another suggestion was to delete paragraph 2 altogether.

37. After discussion, it was decided that paragraph 2 should be retained as drafted and that the draft guide should clarify that an enterprise group member might be prohibited by law or, where the law was silent, by a court from participating in a planning proceeding in another State.

38. The Working Group approved the following text of the draft article:

“Article 17. Participation by enterprise group members in an insolvency proceeding commenced in this State

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State with respect to an enterprise group member that has the centre of its main interests in this State, any other enterprise group member may participate in that insolvency proceeding for the purpose of facilitating cooperation and coordination under this Law, including developing and implementing a group insolvency solution.

2. An enterprise group member that has the centre of its main interests in another State may participate in an insolvency proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. Participation by any other enterprise group member in an insolvency proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

4. An enterprise group member participating in an insolvency proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member is participating in such a proceeding does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution."

Chapter 3. Conduct of a planning proceeding in this State

39. The Working Group agreed to amend the title of the chapter to "Relief available in a planning proceeding in this State."

Article 18 [12]. Appointment of a group representative [in this State]

40. The Working Group agreed to add the words "and authority to seek relief" at the end of the title of the draft article and, in paragraph 1, to delete the words "[one or more enterprise group members participate in a[n insolvency] proceeding referred to in article 17, and]" since they repeated the definition of "planning proceedings" in draft article 2 (g)(i), and to replace the words "by which" with the words "upon which appointment".

41. With respect to a suggestion to replace the words "becomes a planning proceeding" at the end of paragraph 1 with the phrase "takes on the additional function of being a planning proceeding", the view was expressed that the draft model law should envisage holding the planning proceedings separately from the main proceedings although in the same jurisdiction where the main proceeding was taking place. It was suggested that the definition of "planning proceedings" contained in draft article 2 (g) might be amended in order to accommodate such option as follows: "'Planning proceeding' means a main insolvency proceeding commenced in respect of an enterprise group member, or a separate proceeding opened in the jurisdiction where the main proceeding was opened in order to serve as the planning proceeding, provided:".

42. That proposal received some support on the basis that without that addition, the model law might not allow recognition of planning proceedings that might need to take place separately from the main proceedings whether because of requirements of the law or some other consideration, such as the need to avoid conflict of interests between obligations of the insolvency representative in the main proceeding and the planning proceeding. The view was also expressed that accommodating that option would also increase the chances of enactment of the model law in some jurisdictions.

43. Another view was that the suggestion would need to be carefully assessed in the light of its possible implications for other provisions of the draft model law, given the suggestion was related to the fundamental definition in the draft model law. The view was expressed that accommodating the option of holding planning proceedings separately from the main proceedings would not resolve all substantive differences between planning proceedings under the draft model law and one approach to coordination proceedings that was already in effect in some jurisdictions.

44. The Working Group deferred the consideration of that suggestion to a later stage (see paras. 45–48 below).

45. In subsequent discussion, a proposal was made to redraft article 2 (g) as follows: "'Planning proceeding' means a main proceeding commenced in respect of an enterprise group member or a related proceeding opened in the jurisdiction where a main proceeding has been opened that is aimed at developing a group insolvency solution within the meaning of this Law, provided: (i) One or more other enterprise

group members are participating in that proceeding for the purpose of developing and implementing a group insolvency solution; (ii) An enterprise group member subject to a main proceeding in the State of the planning proceeding is a necessary and integral part of that group insolvency solution; and (iii) A group representative has been appointed;".

46. In response to that proposal, the view was expressed that no revision to the definition of "planning proceeding" was required. Concern was expressed that the proposal undermined the basis on which the draft model law had been prepared — that there would not be two proceedings but rather a single proceeding, the main proceeding that would assume the additional functions of the planning proceeding. It was further noted that any amendments to the definition would require careful assessment of its impact on, and relationship with, other provisions, in particular those related to relief and provisions of draft articles 27 to 31.

47. Other delegations, while expressing concerns about the proposal, in particular the use of the term "a related proceeding" and uncertainties as regards the place of the commencement of a related proceeding, recognized that the proposal might help to ensure broader acceptability of the resulting model law. A suggestion was made that the text might permit enacting States to choose between two alternative variants of the definition of "Planning proceeding".

48. The Working Group decided to continue its deliberations on the understanding that a planning proceeding meeting the requirements of the model law might proceed separately from the main proceeding, although it should be somehow linked to that main proceeding. It was explained that the sole fact that the planning proceeding was separate from the main proceeding should not be the reason for declining recognition. It was agreed that the proposal should be revisited to ensure a stronger link between the planning proceeding and the underlying main proceeding. Such linkage was considered by some delegations to be a major condition for recognition of the planning proceeding and granting relief. (For the approved definition of the "Planning proceeding", see para. 96 below.)

49. After discussion, the Working Group approved the following text of draft article 18:

> **"Article 18. Appointment of a group representative and authority to seek relief**
>
> 1. When the requirements of article 2, subparagraphs (g)(i) and (ii) are met, the court may appoint a group representative. Upon that appointment, a group representative shall seek to develop and implement a group insolvency solution.
>
> 2. To support the development and implementation of a group insolvency solution, a group representative is authorized to seek relief pursuant to article 19 in this State.
>
> 3. A group representative is authorized to act in a foreign State on behalf of the planning proceeding and, in particular, to:
>
> (a) Seek recognition of the planning proceeding and relief to support the development and implementation of a group insolvency solution;
>
> (b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and
>
> (c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding."

Article 19 [13]. Relief available to a planning proceeding [taking place in this State]

50. The Working Group agreed: (a) to delete words "[taking place in this State]" in the title; (b) not to implement the drafting suggestion in paragraph 33 of

document A/CN.9/WG.V/WP.161; (c) to implement the drafting suggestion in paragraph 35 of document A/CN.9/WG.V/WP.161; (d) to ensure consistent usage of the phrase "to protect, preserve, realize or enhance [the value of assets of an enterprise group member]" throughout the text, including in articles 19(1) and 19(1)(d), as well as in articles 2(f), 21(1), 21(1)(e), 23(1), 23(1)(f) and 23(2); and (e) to delete the phrase after the words "the value of assets" in paragraph 1(d) (with the understanding that the same change would need to be made also in article 23(1)(f)).

51. The Secretariat was requested to add to the draft guide a commentary to paragraph 2 and to explain the reference to the "assets and operations" of an enterprise group member by way of an example.

52. The Working Group approved the following text of the draft article:

"Article 19. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

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

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(d) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, in order to protect, preserve, realize or enhance the value of assets;

(e) 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;

(f) Staying any insolvency proceeding concerning a participating enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

3. With respect to the assets and operations located in this State of an enterprise group member that has the centre of its main interests in another State, relief under this article may only be granted if that relief does not interfere with the administration of insolvency proceedings taking place in that other State."

Chapter 4. Recognition of a foreign planning proceeding and relief

53. The Working Group agreed to add a provision on limited jurisdiction drawing on article 10 of the MLCBI in response to the proposal contained in paragraph 36 of document A/CN.9/WG.V/WP.161.

Article 20 [14]. Application for recognition of a foreign planning proceeding

54. No support was expressed for deleting paragraph 3 (c). As an alternative to deletion, it was proposed that the paragraph should be redrafted as follows: "A statement to the effect that recognition of the foreign planning proceeding is likely to result in overall combined value for enterprise group subject to or participating in that proceeding." That proposal did not receive support.

55. Recalling its decision to add a provision on limited jurisdiction (see para. 53 above), the Working Group agreed to add the following text at the end of the draft article: "The sole fact that an application pursuant to this Law is made to a court in this State by a group representative does not subject the group representative to the jurisdiction of the courts of this State for any purpose other than the application."

56. With that amendment and retention of the word "foreign" without square brackets, the Working Group approved the draft article.

Article 21 [15]. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

57. No support was expressed for the suggestion to delete the word "foreign" in the draft article.

58. The Working Group approved the draft article with retention of the word "foreign" without square brackets. Consideration of suggestions that might flow from proposed changes to the definition of "planning proceeding" was deferred until after agreement had been reached on revision of that definition (see paras. 41–48 above).

Article 22 [16]. Decision to recognize a foreign planning proceeding

59. No support was expressed for the suggestion to add an additional paragraph to read as follows: "[*enacting States may wish to enact the following provision*] Recognition of the planning proceeding may be refused, if the planning proceeding originates from the States whose main insolvency proceeding, commenced with respect to an enterprise group member subject to or participating in that planning proceeding that is necessary and an integral part of that insolvency solution, is not or will not be recognizable under the law of this State."

60. The Working Group agreed to amend the title of the draft article to read "Recognition of a foreign planning proceeding".

61. With that amendment and with retention of the word "foreign" without square brackets, the Working Group approved the draft article.

Article 23 [17]. Relief that may be granted upon recognition of a foreign planning proceeding

62. The Working Group recalled its decision concerning amendments to be made to the draft article (see points (c), (d) and (e) in para. 50 above). In addition to those amendments, the Working Group agreed: (a) to add in paragraph 1 (f) after the words "value of assets" the phrase "for the purpose of developing or implementing a group insolvency solution"; and (b) to replace in the second sentence of paragraph 2 the words "administer or realize" with the word "distribute".

63. With those amendments and retention of the word "foreign" without square brackets, the Working Group approved the draft article.

Article 24 [18]. Participation of a group representative in a[n insolvency] proceeding [commenced in this State] [under [*identify laws of the enacting State relating to insolvency***]]**

64. No support was expressed for a suggestion to amend the title of the draft article to "Participation of group representatives in insolvency proceedings."

65. A proposal to add the phrase "Upon recognition of a foreign planning proceeding" at the beginning of paragraph 2 did not receive sufficient support.

66. The Working Group agreed to delete the word "[insolvency]" in paragraph 1 and in the title of the draft article to avoid limiting a group representative's ability to participate in proceedings other than insolvency proceedings in the enacting State. It was recalled that that broader approach would be in line with articles 12 and 24 of the MLCBI. It was also agreed that the words "[commenced in this State] [under [*identify laws of the enacting State relating to insolvency*]]" should be removed from the title of the draft article.

67. With those amendments and retention of the word "foreign" without square brackets, the Working Group approved the draft article.

Article 25 [19]. Protection of creditors and other interested persons

68. No support was expressed for a suggestion to delete the words "and other interested persons" in paragraph 1. The prevailing view was that the draft guide would explain the meaning of "other interested persons".

69. The Working Group agreed to move the draft article to chapter 1 or to a stand-alone chapter, to ensure that it was applicable to all situations covered by the draft model law. In subsequent discussion, it was agreed to replace the phrase "each participating enterprise group member" with the phrase "each enterprise group member subject to or participating in a planning proceeding".

70. With those changes, the Working Group approved the draft article.

Article 26 [20]. Approval of a group insolvency solution

71. The suggestion to move paragraph 3 to draft article 18 did not receive support. The Working Group agreed to delete the phrase "and is participating in the [foreign] planning proceeding" in paragraph 1 and move paragraph 2 to chapter 1 as a stand-alone article.

72. With those changes, the Working Group approved the draft article.

Chapter 5. Treatment of foreign claims

Article 27 [21]. Undertaking on the treatment of foreign claims: non-main proceedings

73. The Working Group agreed to add the words "of the main proceeding" at the end of paragraph 2. With that change, the Working Group approved the draft article.

74. The Working Group agreed to explain the meaning of the term "treatment of claims" in the draft guide.

Article 28 [21 bis]. Powers of the court of this State with respect to an undertaking under article 27

75. The Working Group approved the draft article with a change noted in paragraph 90 below.

Part B. Supplemental provisions

76. Concern was expressed about including draft articles 29 to 31 as supplemental provisions. The concern involved a query regarding the objectives and reasons for presenting the provisions as supplemental. It was explained that that approach might have a negative effect upon the enactment of the model law and, in any event, required some further explanation in the draft guide to indicate that the supplemental provisions were presented as such because they had not been acceptable to all States.

77. The discussion of the same issues at earlier sessions of the Working Group was recalled. It was noted that paragraphs 25, 26, 205 and 206 of the draft guide explained the reasons for the approach taken with respect to articles 29 to 31.

78. Suggestions were made to remove the heading of part A and the heading of part B and, instead of dividing the text into parts A and B, to present articles 29 to 31 in a new chapter 6, as supplemental provisions to the provisions of chapter 5.

79. The Working Group agreed to retain the current approach to the presentation of articles 29 to 31, noting that that approach was the result of a compromise achieved in the Working Group.

Article 29 [22]. Undertaking on the treatment of foreign claims: main proceedings

80. Noting that the only difference between draft articles 27 and 29 was that draft article 29 covered both main and non-main proceedings and was therefore alternative to draft article 27, the Working Group agreed to add the phrase “To minimize the commencement of main proceedings or” at the beginning of the draft article, to make the distinction between draft articles 27 and 29 clearer.

81. With that change, the Working Group approved the draft article.

Article 30 [22 bis]. Powers of a court of this State with respect to an undertaking under article 29

82. The Working Group approved the draft article with a change noted in paragraph 90 below.

Article 31 [23]. Additional relief

83. The Working Group approved the draft article without change.

Part A. Core provisions

Chapter 1. General provisions

Preamble and Article 1. Scope

84. The Working Group approved the Preamble with changes suggested in paragraphs 1 and 2 of document A/CN.9/WG.V/WP.161 and draft article 1 without change.

Article 2. Definitions

85. It was agreed to change the chapeau of the draft article to “For the purposes of this Law:”

86. No support was expressed for the suggestion to replace the last words “may be governed by the insolvency law” in definition (a) (“Enterprise”) with the words “subject to insolvency proceedings”.

87. The Working Group recalled its decision to amend definition (f) “Group insolvency solution” (see point (d) in para. 50 above). In addition to that amendment,

the Working Group agreed to add the words “a proposal” before the words “or a set of proposals” in that definition.

88. With respect to definition (g) (“Planning proceeding”), a suggestion was made to replace the last part of subparagraph (ii) with the words “is likely to be a necessary and integral participant in that group insolvency solution”. It was explained that, as drafted, the definition covered a sequence of events and the requirement that the enterprise group member be an essential and integral part of the group insolvency solution could not be known before, or at the outset of, the planning proceeding. Recalling that there were other outstanding issues concerning that definition (see paras. 41–44 above), the Working Group deferred consideration of that suggestion.

89. The Secretariat was requested to ascertain whether there was a need for definition (j) (“Foreign representative”) in the light of the changes agreed to be made to the draft model law at the session and to delete it if appropriate. The Secretariat was also requested to ensure consistent use of the term “the centre of its main interests”.

90. In subsequent discussion, it was agreed to delete definition (j) (“Foreign representative”) and replace the phrase “If a foreign representative of an enterprise group member” with the phrase “If an insolvency representative” in draft articles 28 and 30.

91. With those changes, the Working Group approved the draft article except for the definition “Planning proceeding”, the finalization of which was deferred to a later stage.

92. Subsequently, it was proposed that the following subparagraph should be added to the definition of “Planning proceeding”: “(iv) Subject to the requirements of subparagraphs (g)(i) to (iii), the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this law.”

93. Some concerns were raised about whether a planning proceeding could be separate from the main proceeding. Some delegations were of the view that it would be difficult to accept the proposed additional subparagraph without assessing first its impact on other parts of the draft model law. The preferred solution, it was suggested, would be to include the wording along the following lines before the proposed subparagraph: “[*States may consider extending the scope of the planning proceeding by adopting the following provision*]”.

94. While supporting the proposed wording for the additional subparagraph, some delegations also supported the suggestion that that wording should be presented in the draft model law as an option for enacting States to consider. Other delegations preferred including the new subparagraph without the additional wording in square brackets proposed in paragraph 93 above and to address in the draft guide considerations that enacting States might wish to take into account in enacting that additional subparagraph.

95. Queries were raised as to which court was referred to at the beginning of the proposed subparagraph and when the planning proceeding was formed. Concern was also expressed that the proposed wording did not reflect all differences between the functions of the group representative and a coordinator of coordination proceedings in one region.

96. After discussion, the Working Group approved the definition of “Planning proceeding” with the additional drafting as proposed in paragraph 92 above (which would appear after subparagraph (iii) in that definition but not be numbered subparagraph (iv)) and changes proposed in paragraph 88 above. The Secretariat was requested to make necessary editorial changes in that subparagraph, to include appropriate commentary to that provision in the draft guide and to ensure consistency

in the use of terminology, including the term "main proceeding" as defined in draft article 2 (k).

97. A point was made that, as a result of the introduction of the new subparagraph in the definition of "Planning proceeding", it needed to be clarified whether the phrase "one or more other enterprise group members" in subparagraph (i) of that definition would be suitable for the newly added text. No support was expressed for that proposal.

Article 3. International obligations of this State

98. The Working Group approved the draft article without change.

Article 4 [2 bis]. Jurisdiction of the enacting State

99. Views differed on whether variant 1 or 2 of subparagraph (c) should be retained. The need for subparagraphs (b) and (c) was questioned in the light of subparagraph (a) encompassing points covered by those subparagraphs.

100. Views also differed on whether subparagraph (c), irrespective of the variant chosen, should refer to insolvency or financial distress. Some delegations preferred reference to financial distress with explanation of the meaning of that term being included in the draft guide. Another view was that both terms might be retained with the insertion of the conjunction "or" in between. Yet another view was that the choice between those two options would depend on the variant chosen: reference to financial distress might be more appropriate in variant 1 while reference to insolvency might be more appropriate in variant 2.

101. After discussion, the Working Group agreed to retain variant 2 of subparagraph (c) with the deletion of the words after the words "if required or requested". With that change, the Working Group approved the draft article.

Article 5 [2 quarter]. Competent court or authority

102. The Working Group approved the following text of the draft article:

> **"Article 5. Competent court or authority**
>
> The functions referred to in this Law relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative appointed shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*]."

Article 6 [2ter]. Public policy exception and Article 7. Interpretation

103. The Working Group approved the draft articles without change.

Additional provision to be included in the draft model law

104. The Working Group agreed to include a new provision in the draft model law in the appropriate place drawing on article 16 (2) of the MLCBI. It was understood that that provision would be supplemented by commentary in the draft guide similar to the corresponding commentary in the Guide to Enactment and Interpretation of the MLCBI.

B. Consideration of the draft guide to enactment (A/CN.9/WG.V/WP.162)

105. The Working Group requested the Secretariat to reflect in the draft guide the revisions agreed to be made to the draft model law at the current session, in particular by adding explanations that would accompany the newly added subparagraph in

definition (g) (“Planning proceeding”) (see para. 96 above), making consequential changes in chapter 3 and reflecting the expanded scope of chapter 2.

106. The Secretariat was requested to consider the following changes in the draft guide:

(a) In paragraph 2, to add two concepts that were currently missing — on access to foreign courts and recognition of the group insolvency solution as follows:

(i) To add at the end of paragraph 2 (c) the words “and access to foreign courts for the enterprise group members and representatives”;

(ii) To add an additional subparagraph (h) in paragraph 2 that would refer to formulation and recognition of a group insolvency solution;

(b) To delete the word “multiple” before “insolvency proceedings” in paragraph 3;

(c) To replace, in the second sentence of paragraph 21, the words “relies upon” with the words “as is the case with the MLCBI, it should be interpreted by reference to”;

(d) To reflect in paragraph 25 that supplemental provisions were included for States willing to adopt a more ambitious treatment of the claims of foreign creditors;

(e) To explain in paragraph 38 possible reasons for not having the same person performing the functions of both the insolvency representative and the group representative. It was noted that conflict of interests, as discussed in paragraph 102 of the draft guide, might be one such reason;

(f) To replace, in the first sentence of paragraph 42, the phrase “main proceeding” with the words “the planning proceeding”;

(g) To reflect in paragraph 43, that the ability to opt out of the discussed provisions of the model law would not have any impact on the model law;

(h) To reflect in the section of the draft guide addressing chapter 4 of the model law the need for caution, in the light of the addition of the new subparagraph to definition (g) (see para. 96 above), on the basis of the possibility that a planning proceeding might not be a main proceeding;

(i) To align the commentary on article 3 with the equivalent text in the Guide to Enactment of the Model Law on Recognition and Enforcement of Insolvency-Related Judgements (MLIJ), particularly with respect to binding agreements with non-State parties;

(j) In paragraphs 46 and 48, to use the word “domestic” instead of the word “internal” in references to law and legislation;

(k) To reconsider, in paragraph 50, the example by focusing on the jurisdiction of the centre of main interests of a group member as opposed to the jurisdiction of the establishment of a group member;

(l) To add in paragraph 59 examples of possible public policy exceptions from the Guide to Enactment of MLIJ that refer to infringement of security and sovereignty of the State;

(m) To reflect in the guidance to chapter 2 that enacting States may use additional tools for coordination and cooperation;

(n) To replace, in the first sentence of paragraph 67, the word “authorizes” with the word “requires” and to clarify in the last sentence that reference is made to the value of assets and operations of affected enterprise group members and of the enterprise group as a whole;

(o) To provide examples to explain the phrase “either directly or through” in draft article 8, paragraph 1;

(p) To provide examples to explain the reference to “cross-filing” in draft article 9, subparagraph (j);

(q) To clarify the reference to “body” in draft article 9, subparagraph (e);

(r) To include in the commentary to article 11 the text that would encourage pre-hearing conferences along the following lines: “It is generally advisable to agree on procedures before such consolidated hearings prior to the hearings, including on competences and limitations of any participants or authorities.”;

(s) To provide examples to explain the term “authorities” used in the draft guide (e.g., court officials);

(t) To clarify drafting in paragraph 84 by including in the appropriate place the words “as provided by this Model Law”;

(u) To reflect more accurately in the draft guide that the commentary to article 12 also applied to article 13;

(v) To replace some of the commentary to article 15 with a cross-reference to the Practice Guide;

(w) To emphasize in paragraph 90 that the agreements in question would be useful to developing a group insolvency solution;

(x) To add in paragraph 90, the text along the following lines: “Article 15 does not require the agreement to be approved by the court, leaving this issue to the domestic law and the decision of the representatives involved.”;

(y) To provide examples to explain the meaning of the term “assets and operations” used throughout the draft model law (e.g., that an enterprise group member might have premises owned by one entity, but employees and accounting services might be those of a third party);

(z) To delete in paragraph 153 the italicized text in square brackets. The understanding was that the phrase “subject to and participating in” should consistently be used in the draft model law where the intention was to refer to an enterprise group member that was both subject to the main proceedings and participating in the planning proceeding;

(aa) To add reference to “expediency” in paragraph 159;

(bb) To replace in paragraph 161 a reference to “months” with a reference to “weeks”;

(cc) To redraft the second sentence of paragraph 167 as follows: “As such, the text does not take a position on whether the consequences of the foreign law are imported into the insolvency system of the enacting States or whether the relief in the foreign proceeding includes the relief that will be available under the law of the enacting State.”;

(dd) To discuss who “other interested persons” could be in draft article 25;

(ee) To explain the phrase “adequately protected” used at the end of paragraph 1 of draft article 25; and

(ff) To explain the reasons for retaining the word “foreign” in some provisions of the draft model law, but not in others.

107. No support was expressed for the suggestion to delete reference to concurrent proceedings in paragraph 68.

108. A suggestion to add, at the end of paragraph 179, text along the following lines: “Such creditors interests could however be considered in so far as the court must consider the interests of ‘other interested persons’” was not supported. A proposal to further add the following phrase: “They are also considered under article 27 and supplemental article 29” also did not receive support.

C. Issues of enactment of the model law

109. The Working Group was unanimous in supporting the preparation by the Secretariat of materials that would explain to enacting States how the resulting model law on enterprise group insolvency could be enacted alongside the MLCBI and the MLIJ. The Secretariat was requested to prepare such materials as soon as possible in consultation with experts where necessary, noting that the the model law on enterprise group insolvency should be considered once the text had been finalized and adopted. The approval of the Working Group of that project was not considered necessary. A point was made that experience with the enactment of those instruments might usefully be added to such a guidance note in the future.

D. Decisions of the Working Group as regards the draft model law and the draft guide to enactment

110. The Working Group approved the text of the draft model law annexed to this report and requested the Secretariat to circulate it for comment by States and international organizations invited to sessions of the Working Group. The Working Group expected that the draft model law, together with any comments received from States and the international organizations, would be transmitted for finalization and adoption by the Commission at its fifty-second session, in 2019.

111. The Working Group requested the Secretariat to revise the draft guide reflecting the changes agreed to be made at the current session. The Working Group expected that a revised text of the draft guide would be considered at the next session of the Working Group and subsequently transmitted to the Commission for finalization and adoption together with the draft model law. It was understood that there would be no time to further revise the draft guide after the Working Group's next session for consideration by the Commission in July 2019, and therefore that any agreed amendments to the draft guide would only be listed in the report of the Working Group for consideration by the Commission.

V. Obligations of directors of enterprise group companies

112. The Working Group agreed to make the following changes to document A/CN.9/WG.V/WP.153:

(a) To use the term "group insolvency solution" throughout;

(b) To add a glossary of relevant terms from the draft model law;

(c) To retain paragraph 1(f) of recommendation 268 without square brackets;

(d) To delete "[and]" after subparagraph (d) and retain "and" after subparagraph (e) without square brackets;

(e) To replace the word "parties" with "persons" in recommendation 270 (b);

(f) To replace the text in square brackets in paragraph 7 with words along the following lines: "Failing to understand the complexity of the director's obligations may bring about the failure that it is hoped to avoid.";

(g) In paragraph 11, to replace the first sentence with the following: "In determining the best interests of the directed group member, a director may weigh and consider various interests. These interests may also include the interests of other group members, or the group as a whole, where those interests are also consistent with the interests of the directed group member."; and

(h) To delete in the first sentence of paragraph 27 the words "agreed with fellow directors".

113. With those amendments, the Working Group approved the text contained in document A/CN.9/WG.V/WP.153 and requested the Secretariat to transmit the revised text for finalization and adoption by the Commission at its next session, in 2019.

VI. Insolvency of MSMEs: consideration of the draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.163)

A. General statements

114. Some delegations recalled the mandate given to the Working Group on the topic of MSMEs' insolvency according to which the UNCITRAL Legislative Guide on Insolvency Law was to be used as the starting point for discussions. The view was expressed that document A/CN.9/WG.V/WP.163 was helpful to that end since it followed the structure and recommendations of the Legislative Guide.

115. It was observed that consideration of that document would assist in identifying issues that were not addressed in the Legislative Guide, as well as issues that would justify different treatment in the context of MSMEs' insolvency. Personal guarantees and parallel proceedings for MSMEs and managers were given as examples of issues not addressed in the Legislative Guide, but that required detailed treatment in the context of MSMEs insolvency.

116. Other delegations questioned whether the work product should result in new recommendations being adopted that would amend or somehow modify existing recommendations. It was noted that, although long-standing terms and concepts and generally applicable principles of the Legislative Guide could be used, the work could be limited to the core provisions, such as the debtor-in-possession regime and safeguards against abuse. The view was expressed that a single recommendation could be prepared that would address the problems commonly encountered by MSMEs facing financial difficulties and solutions that were found in legislation across the world.

B. Form of a possible document addressing MSMEs insolvency

117. The range of options for the possible form of the final document was suggested, from an annex to the Legislative Guide to a stand-alone document. Some delegations considered it premature to decide on the final form of document to be prepared, emphasizing the need to focus first on finding solutions suitable for the intended beneficiaries.

C. Scope and focus

118. The view was expressed that a definition of MSMEs might be necessary since the availability of certain mechanisms for resolving financial difficulties might depend on whether an entity is micro, small or medium. The prevailing view was that, while defining entities that could benefit from a simplified insolvency regime would not be feasible, the work should focus on the needs of micro and small entities in the first instance.

119. Consistent with the approach taken in UNCITRAL Working Group I (MSMEs), it was agreed to continue focusing deliberations on the features and tools of a simplified insolvency regime rather than entities that might benefit from those tools.

D. Comments on possible recommendations

1. Text box after paragraph 30

120. Key objectives listed in paragraph 1 bis were considered relevant to the objectives of a simplified insolvency regime to complement those listed in recommendation 1 of the Legislative Guide, although it was suggested that recommendations 1 (g) and (h) might be less important for a simplified insolvency regime. In response, it was observed that the key objectives would be applicable, but that different means might be devised for small debtors to achieve them. Concern was expressed that the work should maintain the balance achieved in the Legislative Guide between the interests of creditors and debtors.

121. Recommendation 2 was considered adequate in the simplified insolvency context. The importance of out-of-court and hybrid procedures in addition to simplified liquidation and reorganization in the simplified insolvency context was highlighted. Although not necessarily falling under insolvency law, those procedures were considered to be means of achieving effective reorganization or liquidation and were therefore essential for consideration in that context.

122. Another view was that court proceedings had proven in some jurisdictions to be more effective than other types of procedure. It was explained that certain preconditions ought to be in place for out-of-court and hybrid procedures to be effective, such as incentives for financial institutions to negotiate debt restructuring and to provide for a standstill. The view was expressed that those procedures were generally more suitable for large and medium-sized enterprises. Other delegations provided examples of incentives already available in the financial sector to negotiate debt restructuring with small debtors which, in order to be effective, should consider potential tax implications of any debt forgiveness. In other jurisdictions, it was noted, experience with administrative out-of-court procedures and mediation procedures supervised by the court was positive.

123. With respect to recommendation 5, it was considered that in the majority of cases of micro and small enterprises, cross-border considerations would be unnecessary. The prevailing view, however, was that the recommendation could nevertheless be considered relevant since the possibility of cross-border insolvencies, particular of medium-sized enterprises, could occur.

124. Several delegations were of the view that the common features of insolvency law listed in recommendation 7 would be applicable also in the simplified insolvency context. Another view was that recommendation 7 might be supplemented by features specific to a simplified insolvency regime. It was considered essential to emphasize that any solution should be simple, practical and cost-efficient and respect a balance between debtor and creditor interests.

125. The view was expressed that recommendations 255–266 on directors' obligations would be relevant for efforts to increase awareness among MSMEs' managers of their obligations in the period approaching insolvency.

126. Different views were expressed on whether a simplified insolvency regime should envisage close coordination among related insolvency proceedings (recs. 202–210). Some delegations were of the view that domestic insolvency and bankruptcy laws and civil law procedures would adequately provide for such a possibility, while other delegations thought that inclusion of a recommendation specifically addressing that point in the context of a simplified insolvency regime would be desirable. It was explained that legislation of some countries would not necessarily enable such coordination and some countries might lack laws addressing the bankruptcy of natural persons.

2. Text box after paragraph 56

127. The view was expressed that recommendations 160–168 were relevant to hybrid but not to out-of-court procedures. The term "hybrid" was found to be confusing and

use of another term was suggested. Concerns were also expressed about use of the term “small debtors”.

128. With reference to recommendation 160, the Working Group considered whether hybrid procedures could be initiated only by application of the debtor or also of a creditor. It was considered appropriate to envisage both possibilities.

129. Views differed on the role of the court in hybrid proceedings. It was noted that the Legislative Guide contained a broad definition of the word “court”, encompassing not only judicial but also other authorities competent to control or supervise insolvency proceedings (definition (i) in the Glossary of the Legislative Guide). It was noted that in hybrid procedures, the involvement of such other authorities instead of traditional courts might be sufficient to provide necessary protection, safeguards and trust. It was further noted that such authorities might assume the function of an institutional mediator, or be empowered to compel, or create incentives for, parties to negotiate and reach a settlement agreement. The purely contractual nature of out-of-court procedures, which did not depend upon the insolvency law in order to be enforceable, was highlighted.

130. The importance of educational tools, economic support and the provision of timely assistance to small debtors, including in the form of templates and third-party involvement, was highlighted. It was generally understood that it would be unrealistic to expect that small debtors would be in the position to prepare a sound restructuring plan without any third-party assistance.

131. Devising mechanisms that could assist small debtors to avoid facing the social stigma of insolvency, including by providing exceptions to public disclosure and identifying appropriate commencement criteria, was considered relevant, although it was also noted that restricting public disclosure could raise sensitive political issues. It was also considered important to stipulate conditions for recourse to ordinary insolvency proceedings when out-of-court, hybrid and other alternative procedures were available.

132. Recognizing that there were various types of procedures falling under each category (out-of-court, hybrid and court-based), the Secretariat was requested to describe them in more detail.

3. Text box after paragraph 62

133. The approach to drafting a recommendation on fast track procedures was found to be acceptable, provided there was the flexibility of possible exceptions to the permissible number of extensions of the default timelines. Other recommendations referred to in that section were considered adequate for the simplified insolvency context.

4. Text box after paragraph 78

134. Concerns were expressed about any suggestion to restrict the rights of creditors to commence insolvency proceedings involving a small debtor. The other view was that exceptions to the right of a creditor to commence proceedings should be provided, for example in zero-asset cases. It was noted that in some jurisdictions, creditors would not have the right to commence liquidation proceedings in the cases referred to in recommendation 16 (b). In addition, there were jurisdictions in which sanctions might apply if creditors abused their entitlement to commence insolvency proceedings. Nevertheless, it was generally agreed that creditors would need some mechanism to initiate proceedings.

135. It was agreed that the debtor-in-possession approach should be the default. Nevertheless, it was also recognized that some exceptions to that rule might be justified, including because the debtor might need the assistance of an insolvency professional in more complex situations. Various mechanisms to compensate for the services provided by such professional were illustrated, including a flat rate from the sale of assets in liquidation or payment in instalments from future cash flow in the

case of reorganization. In some jurisdictions, it was noted, the court, rather than the insolvency representative, assisted small debtors with sale of assets and with other steps in liquidation and reorganization, and that public funds were available for use in no-asset cases.

5. Text box after paragraph 99

136. The recommendations referred to in that section were considered generally adequate for the simplified insolvency context, subject to certain qualifications, such as that there could be supervision of the debtor when needed, provided that could be achieved in a manner that minimized cost. It was suggested that debtors should be required to demonstrate the value of continuation of business upon commencement of reorganization proceedings to avoid abuse. Revisiting recommendations requiring a disclosure statement and simplifying some procedural requirements, such as replacing voting requirements with confirmation by the court, was also suggested. It was noted that cases in which avoidance proceedings were required, as covered by recommendation 93, might justify the use of ordinary proceedings and thus involvement of an insolvency representative.

6. Text box after paragraph 104

137. Recommendation 158 was considered sufficient, with the caveat that liquidation would not be appropriate in the case of natural persons. A general preference was expressed for preserving flexibility in converting various types of proceedings.

7. Text box after paragraph 111

138. The recommendations referred to in the section were considered applicable in the simplified insolvency context with some exceptions. In particular, it was recognized that some assets that might not usually be excluded from the insolvency estate might need to be excluded in order to facilitate a fresh start.

8. Text box after paragraph 114

139. The recommendations referred to in the section were considered applicable in the simplified insolvency context, except for that part of the second sentence of recommendation 63 referring to creditor consent.

9. Text box after paragraph 123

140. There was general support for applying recommendations 194–196 to small debtors. There was some discussion of the possibility of providing the equivalent of a discharge to small debtors that were legal entities, as well as the need to ensure that certain types of debt were excluded from the discharge and to address abuses, such as repeated recourse to insolvency proceedings for the purpose of obtaining a discharge. The need for clear criteria for differentiating the types of debt that could be discharged from those that could not was noted.

141. Views differed on whether a simplified insolvency regime should address issues such as access to credit following discharge that might go beyond insolvency law, although it was noted that one of the objectives of the simplified insolvency regime listed in proposed recommendation 1 bis was promoting a fresh start for debtors.

10. Other issues

142. Coordination of parallel proceedings, treatment of personal guarantees and treatment of pre-commencement debt were noted as being among other issues that were important to consider in the simplified insolvency context.

E. Comments on the draft commentary

143. It was suggested that: (a) the commentary should note not only the informality of many small debtors, but also of their creditors; (b) the first sentence of 19 should reflect that formal insolvency regimes in some countries were designed with small debtors in mind; (c) the inclusion of the penultimate sentence in paragraph 25 should be reconsidered; (d) the commentary should take a more balanced approach and avoid a debtor-centric discussion; (e) paragraph 49 should address legal consequences of commencement of procedures, in particular that parties concerned might be compelled by the court to settle; (f) paragraph 58 should also refer to zero-asset cases, envisaging an approach in which a declaratory statement produced automatic legal consequences with proceedings being immediately closed; (g) the commentary should reflect that certain groups of creditors (e.g., employees) might be more vulnerable than others; and (h) the penultimate sentence of paragraph 58 should be redrafted to promote transparency by requiring presentation of evidence, which might not necessarily require certification and might be presented online.

Annex

Draft model law on enterprise group insolvency

Part A. Core provisions

Chapter 1. General provisions

Preamble

The purpose of this Law is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group, in order to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in those cases;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in those cases;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

(g) Adequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons.

Article 1. Scope

1. This Law applies to enterprise groups where insolvency proceedings have commenced for one or more of its members, and addresses the conduct and administration of those insolvency proceedings and cross-border cooperation between those insolvency proceedings.

2. This Law does not apply to a proceeding concerning [*designate any types of entity, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

Article 2. Definitions

For the purposes of this Law:

(a) “Enterprise” means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;

(b) “Enterprise group” means two or more enterprises that are interconnected by control or significant ownership;

(c) “Control” means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) “Enterprise group member” means an enterprise that forms part of an enterprise group;

(e) “Group representative” means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

(f) “Group insolvency solution” means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;

(g) “Planning proceeding” means a main proceeding commenced in respect of an enterprise group member provided:

(i) One or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution;

(ii) The enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and

(iii) A group representative has been appointed;

Subject to the requirements of subparagraphs (g)(i) to (iii), the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this Law;

(h) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(i) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the enterprise group member debtor’s assets or affairs or to act as a representative of the insolvency proceeding;

(j) “Main proceeding” means an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests;

(k) “Non-main proceeding” means an insolvency proceeding, other than a main proceeding, taking place in a State where the enterprise group member debtor has an establishment within the meaning of subparagraph (l) of this article; and

(l) “Establishment” means any place of operations where the enterprise group member debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. Jurisdiction of the enacting State

Where an enterprise group member has the centre of its main interests in this State, nothing in this Law is intended to:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member’s participation in a group insolvency solution being developed in another State;

(c) Limit the commencement of insolvency proceedings in this State, if required or requested; or

(d) Create an obligation to commence an insolvency proceeding in this State in respect of that enterprise group member when no such obligation exists.

Article 5. Competent court or authority

The functions referred to in this Law relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative appointed shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 7. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 8. Additional assistance under other laws

Nothing in this Law limits the power of a court or an insolvency representative to provide additional assistance to a group representative under other laws of this State.

Chapter 2. Cooperation and coordination

Article 9. Cooperation and direct communication between a court of this State and other courts, insolvency representatives and any group representative appointed

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, other courts, insolvency representatives or any group representative appointed.

Article 10. Cooperation to the maximum extent possible under article 9

For the purposes of article 9, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with other courts, an insolvency representative or any group representative appointed;

(c) Coordination of the administration and supervision of the affairs of enterprise group members;

(d) Coordination of concurrent insolvency proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval and implementation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(g) Cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication;

(h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

(i) Approval of the treatment and filing of claims between enterprise group members;

(j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

(k) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 11. Limitation of the effect of communication under article 9

1. With respect to communication under article 9, a court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

2. Participation by a court in communication pursuant to article 9, paragraph 2, does not imply:

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

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.

Article 12. Coordination of hearings

1. A court may conduct a hearing in coordination with another court.

2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.

3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

Article 13. Cooperation and direct communication between a group representative, insolvency representatives and courts

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts and insolvency representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts and insolvency representatives of other enterprise group members.

Article 14. Cooperation and direct communication between an insolvency representative appointed in this State, other courts, insolvency representatives of other group members and any group representative appointed

1. An insolvency representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts, insolvency representatives of other enterprise group members and any group representative appointed.

2. An insolvency representative appointed in this State is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts, insolvency representatives of other enterprise group members and any group representative appointed.

Article 15. Cooperation to the maximum extent possible under articles 13 and 14

For the purposes of article 13 and article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between an insolvency representative appointed in this State, insolvency representatives of other group members and any group representative appointed;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

Article 16. Authority to enter into agreements concerning the coordination of insolvency proceedings

An insolvency representative and any group representative appointed may enter into an agreement concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed.

Article 17. Appointment of a single or the same insolvency representative

A court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group.

Article 18. Participation by enterprise group members in an insolvency proceeding commenced in this State

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State with respect to an enterprise group member that has the centre of its main interests in this State, any other enterprise group member may participate in that insolvency proceeding for the purpose of facilitating cooperation and coordination under this Law, including developing and implementing a group insolvency solution.

2. An enterprise group member that has the centre of its main interests in another State may participate in an insolvency proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. Participation by any other enterprise group member in an insolvency proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

4. An enterprise group member participating in an insolvency proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member is participating in such a proceeding does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

Chapter 3. Relief available in a planning proceeding in this State

Article 19. Appointment of a group representative and authority to seek relief

1. When the requirements of article 2, subparagraphs (g)(i) and (ii) are met, the court may appoint a group representative. Upon that appointment, a group representative shall seek to develop and implement a group insolvency solution.

2. To support the development and implementation of a group insolvency solution, a group representative is authorized to seek relief pursuant to article 20 in this State.

3. A group representative is authorized to act in a foreign State on behalf of the planning proceeding and, in particular, to:

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of a group insolvency solution;

(b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and

(c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

Article 20. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

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

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(d) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, in order to protect, preserve, realize or enhance the value of assets;

(e) 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;

(f) Staying any insolvency proceeding concerning a participating enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

3. With respect to the assets and operations located in this State of an enterprise group member that has the centre of its main interests in another State, relief under this article may only be granted if that relief does not interfere with the administration of insolvency proceedings taking place in that other State.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 21. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the foreign planning proceeding to which the group representative was appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision appointing the group representative; or

(b) A certificate from the foreign court affirming the appointment of the group representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence concerning the appointment of the group representative that is acceptable to the court.

3. An application for recognition shall also be accompanied by:

(a) A statement identifying each enterprise group member participating in the foreign planning proceeding;

(b) A statement identifying all members of the enterprise group and all insolvency proceedings that are known to the group representative that have been commenced in respect of enterprise group members participating in the foreign planning proceeding; and

(c) A statement to the effect that the enterprise group member subject to the foreign planning proceeding has the centre of its main interests in the State in which that planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

5. The sole fact that an application pursuant to this Law is made to a court in this State by a group representative does not subject the group representative to the jurisdiction of the courts of this State for any purpose other than the application.

6. The court is entitled to assume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

Article 22. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition of a foreign planning proceeding until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant relief of a provisional nature, including:

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

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying any insolvency proceeding concerning the enterprise group member;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(e) In order to protect, preserve, realize or enhance the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(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) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

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

3. Unless extended under article 24, subparagraph 1(a), the relief granted under this article terminates when the application for recognition is decided upon.

4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

Article 23. Recognition of a foreign planning proceeding

1. A foreign planning proceeding shall be recognized if:

(a) The application meets the requirements of article 21, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 5.

2. An application for recognition of a foreign planning 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 group representative shall inform the court of material changes in the status of the foreign planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

Article 24. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a foreign planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in the foreign planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

(a) Extending any relief granted under article 22, paragraph 1;

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

(c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(d) Staying any insolvency proceeding concerning the enterprise group member;

(e) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(f) In order to protect, preserve, realize or enhance the value of assets for the purpose of developing or implementing a group insolvency solution, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(g) 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;

(h) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(i) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. In order to protect, preserve, realize or enhance the value of assets for the purposes of developing or implementing a group insolvency solution, the distribution of all or part of the enterprise group member's assets located in this State may be entrusted to an insolvency representative appointed in this State. Where that insolvency representative is not able to distribute all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

Article 25. Participation of a group representative in proceedings in this State

1. Upon recognition of a foreign planning proceeding, the group representative may participate in any proceeding concerning an enterprise group member that is participating in the foreign planning proceeding.

2. The court may approve participation by a group representative in any insolvency proceeding in this State concerning an enterprise group member that is not participating in the foreign planning proceeding.

Article 26. Approval of a group insolvency solution

1. Where a group insolvency solution affects an enterprise group member that has the centre of its main interests or an establishment in this State, the portion of the group solution affecting that enterprise group member shall have effect in this State once it has received any approvals and confirmations required in accordance with the law of this State.

2. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of a group insolvency solution.

Chapter 5. Protection of creditors

Article 27. Protection of creditors and other interested persons

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors of each enterprise group member subject to or participating in a planning proceeding and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under this Law, or at its own motion, modify or terminate such relief.

Chapter 6. Treatment of foreign claims

Article 28. Undertaking on the treatment of foreign claims: non-main proceedings

1. To minimize the commencement of non-main proceedings or facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) An undertaking to accord such treatment is given by the insolvency representative appointed in the main proceeding in this State. Where a group

representative is appointed, the undertaking should be given jointly by the insolvency representative and the group representative;

(b) The undertaking meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. An undertaking given under paragraph 1 shall be enforceable and binding on the insolvency estate of the main proceeding.

Article 29. Powers of the court of this State with respect to an undertaking under article 28

If an insolvency representative or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 28, a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State; and

(b) Stay or decline to commence a non-main proceeding.

Part B. Supplemental provisions

Article 30. Undertaking on the treatment of foreign claims: main proceedings

To minimize the commencement of main proceedings or to facilitate the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may undertake to accord to those claims the treatment in this State that they would have received in an insolvency proceeding in that other State and the court in this State may approve that treatment. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

Article 31. Powers of a court of this State with respect to an undertaking under article 30

If an insolvency representative or a group representative from another State in which an insolvency proceeding is pending has given an undertaking under article 30, a court in this State may:

(a) Approve the treatment in the foreign insolvency proceeding of the claims of creditors located in this State; and

(b) Stay or decline to commence a main proceeding.

Article 32. Additional relief

1. If, upon recognition of a foreign planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in that proceeding, particularly where an undertaking under article 28 or 30 has been given, the court, in addition to granting any relief described in article 24, may stay or decline to commence an insolvency proceeding in this State with respect to any enterprise group member participating in the foreign planning proceeding.

2. Notwithstanding article 26, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the creditors of the affected enterprise group member are or will be adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 24 that is necessary for implementation of the group insolvency solution.