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Report of Working Group V (Insolvency Law) on the work of its fifty-fifth session (New York, 28–31 May 2019)

Contents

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I. Introduction

A. Draft guide to enactment of the model law on enterprise group insolvency

1. The work on the topic of enterprise group insolvency has continued in the Working Group pursuant to the mandate approved by the Commission at its forty-seventh session, in 2014.[1] At its fifty-fourth session (Vienna, 10–14 December 2018), the Working Group approved the text of the draft model law on enterprise group insolvency annexed to the report of that session and requested the Secretariat to transmit it to the Commission for finalization and adoption at its fifty-second session, in 2019 (A/CN.9/966, para. 110). At the same session, the Working Group requested the Secretariat to revise a draft guide to enactment of the model law reflecting the changes agreed to be made at that session to both the draft model law and the draft guide (A/CN.9/966, para. 111). At its fifty-fifth session, the Working Group considered a revised text of the draft guide (A/CN.9/WG.V/WP.165).

B. Insolvency of micro, small and medium-sized enterprises (MSMEs)

2. At its forty-sixth session, in 2013, the Commission requested Working Group V to conduct a preliminary examination of issues relevant to the insolvency of MSMEs.[2] At its forty-seventh session, in 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, in 2016, the Commission clarified the mandate of Working Group V with 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) and fifty-first (May 2017) (A/CN.9/903) sessions. At its fifty-third session (May 2018), the Working Group had before it document A/CN.9/WG.V/WP.159, upon which it made various observations (A/CN.9/937, chapter VI). Based on that paper and those observations, a draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.163) was presented to the Working Group for consideration at its fifty-fourth session (December 2018). At that session, the Working Group suggested revisions to that text (A/CN.9/966, chapter VI). The Working Group continued its deliberations at the fifty-fifth session on the basis of a revised draft (A/CN.9/WG.V/WP.166).

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.
[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.
[4] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

II. Organization of the session

3. Working Group V, which was composed of all States members of the Commission, held its fifty-fifth session in New York from 28 to 31 May 2019. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Libya, Mexico, Namibia, Nigeria, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was attended by observers from the following States: Bahrain, Cambodia, Croatia, Dominican Republic, Estonia, Eswatini, Finland, Iraq, Madagascar, Malta, Morocco, Netherlands, Qatar, Saudi Arabia, Senegal, South Africa, Sudan and Viet Nam.

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

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank Group (WBG);

(b) *Invited international governmental organizations*: International Association of Insolvency Regulators (IAIR);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Fondation pour le Droit Continental, Ibero-American Institute of International Economic Law, INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), New York City Bar (NYCBAR) and Union Internationale des Avocats (UIA).

7. The Working Group elected the following officers:

Chairman: Wisit WISITSORA-AT (Thailand)

Rapporteur: Luis Manuel C. MÉJAN (Mexico)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.164);

(b) Note by the Secretariat containing a draft guide to enactment of the draft model law on enterprise group insolvency (as contained in an annex to the report of the fifty-fourth session of the Working Group (A/CN.9/966)) (A/CN.9/WG.V/WP.165);

(c) Note by the Secretariat containing a draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.166).

9. 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

10. The Working Group commenced its work with the discussion of the draft guide to enactment of the draft model law on enterprise group insolvency (as contained in an annex to the report of the fifty-fourth session of the Working Group (A/CN.9/966)) (A/CN.9/WG.V/WP.165). The Working Group approved the text of the draft guide to enactment as amended at the session (see chapter IV of this report) and requested the Secretariat to transmit the draft as contained in document A/CN.9/WG.V/WP.165 together with the amendments thereto listed in paragraphs 13 and 14 (c) of this report to the Commission for finalization and adoption together with the draft model law approved by the Working Group at its fifty-fourth session (A/CN.9/966, annex) and slightly amended at the current session (see paragraph 13 and an annex of this report) (see also para. 23 below).

11. The Working Group proceeded with the consideration of a draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.166) and suggested revisions to the text (see chapter V of this report). The Working Group requested the Secretariat to prepare a revised text for consideration by the Working Group at its fifty-sixth session (see also paras. 58 and 59 below).

12. The Working Group also discussed proposals for possible future work by UNCITRAL in the area of insolvency law (see chapter VI of this report).

IV. Enterprise group insolvency: consideration of a draft guide to enactment (A/CN.9/WG.V/WP.165)

A. Deliberations

13. The Working Group agreed to make the following revisions to the draft guide to enactment and to recommend to the Commission the following changes to the draft model law as contained in the annex to the report of the Working Group on the work of its fifty-fourth session (A/CN.9/966) and reproduced in document A/CN.9/WG.V/WP.165:

(a) In paragraph 22, to change the reference to article 19, paragraph 1, to article 2, subparagraph (g);

(b) To delete the words “cross-border” from the chapeau and subparagraph (d) of the Preamble, and from draft article 1, paragraph 1, of the draft model law;

(c) To delete the final sentence from paragraph 39;

(d) To highlight the potential existence of multiple planning proceedings by moving the final two sentences of paragraph 44 into a new paragraph;

(e) To add the word “usually” before the word “prevail” in paragraph 50;

(f) To include the words “or agreement(s)” after the words “international treaty(ies)” in paragraph 51 and elsewhere to maintain consistency with the terminology as used in paragraph 50;

(g) To correct a cross reference to paragraph 104 after paragraph 67;

(h) To delete the final sentence of paragraph 101;

(i) To delete the words “, of the article” from paragraph 112;

(j) To include the words “Appointment of a group representative” in the heading of chapter 3;

(k) To include the words “this article and” before the words “article 20” in draft article 19, paragraph 2;

(l) To add in paragraph 123 after the second sentence: “As further set forth in paragraph 173 below, this text does not take a position on whether the consequences of the foreign law are imported into the insolvency system of the enacting State.”;

(m) To modify the final clause of paragraph 129 to read: “the stay could be terminated in respect of that enterprise group member and any insolvency proceedings commenced could continue” as an alternative to a suggestion to amend the same sentence along the following lines: “the stay would continue to apply until the court supervising the insolvency proceeding of the relevant group member decides otherwise and any insolvency proceedings commenced in relation to other group members could continue.”;

(n) To amend the final sentence of paragraph 137 to read: “It might be noted that since the definition of ‘planning proceeding’ envisages that such a proceeding may not itself be a main proceeding, albeit related to a main proceeding (art. 2, subpara. (g)), caution may need to be exercised in applying the provisions on recognition and relief.”;

(o) In draft article 21, paragraph 6 (and consequently in para. 149 of the draft guide), to change the word “assume” to the word “presume”. Other suggestions with respect to that provision, which were not accepted, were to move that provision to draft article 23 and amend it to provide for the authority of courts of the recognizing State to consider whether to treat non-legalized documents as authentic;

(p) To add the word “currently” to the second sentence of paragraph 143 before the word “participating”;

(q) To replace the phrase “to the foreign representative” with the phrase “as provided in paragraph 2” in the fourth sentence of paragraph 178;

(r) To replace in the first sentence of paragraph 182 the phrase “any proceeding taking place in another State” with the phrase “any insolvency proceeding taking place in the enacting State” and to delete the third sentence of that paragraph;

(s) To add the word “insolvency” between the words “group” and “solution” in draft article 26, paragraph 1;

(t) In paragraph 185, to replace the words “by the court of” with the word “in”;

(u) To include the words “the relevant portion of” before “the group insolvency solution” in the second clause of the second sentence of paragraph 185 and in the second sentence of paragraph 186;

(v) To include the words “and other interested persons” to the heading of chapter 5;

(w) To delete the fourth sentence in paragraph 188 in response to a suggestion to replace the words “will not be disadvantaged” with the words “are materially prejudiced” in that same sentence. In deleting the sentence, the Working Group removed reference to the word “lien” (some delegations had requested substituting that word with the words “security interest”, “security right” or “collateral”);

(x) To delete the first example in the second sentence of paragraph 197 that reads: “where the law applicable to the foreign claims in their State of origin cannot be applied in the main proceedings in the other State;”;

(y) To replace the words “are typically” with the words “should be” in paragraph 198;

(z) To replace the words “with the law applicable to the claim”, which appear twice in paragraph 201, with the words “with the treatment it would be accorded in a non-main proceeding”;

(aa) To replace the first eight words of paragraph 205 with the words: “The Model Law does not address either the legal consequences for affected creditors or

sanctions" and to delete the text in parentheses. This was agreed in response to the suggestion to modify the paragraph by adding the words "(e.g., consequences for and recourses available to the affected creditors and the estate of the insolvent enterprise group)" after the words "the sanctions" and deleting the words in parentheses. Concerns were raised that it might be difficult to convey a distinct meaning between "sanctions" and "consequences" in translation;

(bb) To replace in draft article 29 (a) the words "claims of creditors located in this State" with the words "claims that might otherwise be brought in a non-main proceeding in this State";

(cc) To replace the first three sentences of paragraph 207 with the following: "As stated above (para. 57), non-main proceedings can serve different purposes and have advantages and disadvantages." It was further agreed to delete the phrase "For that reason," in the subsequent sentence and to begin it with the words "Article 29…";

(dd) To include before the final sentence of paragraph 207 the following two sentences: "The court's powers are discretionary under this article. For example, it may exercise its authority under subparagraph (a), (b), or both.";

(ee) To retain the first clause of paragraph 212, but to replace the remaining text with the following: "permitting treatment of a foreign claim in a main proceeding in the enacting State even if that claim is a claim that could be brought by a creditor in a main proceeding in another State.";

(ff) To replace in draft article 31 (a) the words "claims of creditors located in this State" with the words "claims that might otherwise be brought in a proceeding in this State";

(gg) To change the reference to "article 32" in the second sentence of paragraph 216 to the reference to "article 32, paragraph 1".

14. No sufficient support was expressed for the following suggestions:

(a) To replace the word "usually" with the word "often" in the first sentence of paragraph 29;

(b) With reference to paragraph 25 of the draft guide, to replace in draft article 2 (h) and throughout the draft guide the phrase "assets and affairs" with the phrase "assets and operations". It was pointed out that the two phrases conveyed different meanings and that both should be retained depending on the context in which they were used in both the draft model law and the draft guide. It was also pointed out that draft article 2 (h) drew on the definition of "foreign proceeding" found in the Model Law on Cross-Border Insolvency (the MLCBI) where the phrase "assets and affairs" was used;

(c) To delete the words "significant ownership" from draft article 2 (b) or define that term in the draft model law. It was instead agreed that paragraph 39 of the draft guide should cross refer to the UNCITRAL Legislative Guide on Insolvency Law, part three, paragraphs 26 to 30, where the notions of "control" and "ownership" were discussed. It was noted that the Legislative Guide was a different instrument from a model law and that legal effect would be given to the term in enacting States. It was agreed that paragraph 39 should therefore highlight that enacting States should consider defining the term "significant ownership" in their domestic law upon enactment of the model law on enterprise group insolvency (MLEGI) to avoid possible uncertainties and litigation;

(d) To clarify in paragraph 44 of the draft guide whether planning proceedings could simultaneously take place as stand-alone and as part of the main proceeding;

(e) To move the third to the last sentence of paragraph 44 together with the two last sentences to a separate paragraph;

(f) To delete the penultimate sentence in paragraph 44;

(g) To add in paragraph 46 before the words “(art. 18)” the words “where that proceeding is the main proceeding as defined in article 2 (j)”;

(h) To add the words “procedure or process required for” before the words “the participation” in paragraph 55;

(i) To delete the penultimate sentence in paragraph 83;

(j) To replace the phrase “relevant officials” with “relevant court officials” in paragraph 88;

(k) To delete paragraph 102 or expand it by reference to situations where a debtor was assisted or supervised by an insolvency professional;

(l) To add “where that proceeding is a main proceeding” to the end of the third sentence of paragraph 123;

(m) To change “a COMI” to “its COMI” in paragraph 185;

(n) To add at the end of paragraph 196: “In addition, they can contribute to the overall objectives of enhancing the value of enterprise group members for the benefit of creditors and of increasing the chances of the successful reorganization.”;

(o) To add a qualifier in the examples (a) and (b) in paragraph 201 reading “to the extent relevant”, which would indicate that distribution of proceeds would be subject to the rule on ranking of claims in the main proceeding;

(p) To change a conjunction “and” with a conjunction “and/or” or “or” in draft article 29.

15. Queries were raised with respect to the phrase “subject to a planning proceeding” in paragraph 22 and a need for two closely linked concepts of the group insolvency solution and the planning proceeding in draft article 2. Questions were also raised in connection with a passage in paragraph 51 that invited enacting States to provide that in order for draft article 3 to displace a provision of the domestic law, a sufficient link should exist between the international treaty concerned and the issue governed by the provision of the domestic law in question. No specific drafting suggestions were made with respect to those queried provisions and no support was expressed for changing them.

16. Further queries were raised as regards the final sentence of paragraph 188, in particular references to creditors of enterprise groups generally and creditors of non-participating enterprise groups. It was also questioned whether the examples in paragraph 201 covered situations with different enterprise group members rather than the same enterprise group member.

17. A proposal was made to add a new subparagraph in draft article 21, paragraph 2, requiring the submission of a certified copy of a court decision approving a planning proceeding, as was envisaged in the second sentence of draft article 2 (g). It was suggested that the proposed new subparagraph could read as follows: “If applicable, a certified copy of the decision of a court approval set forth in the second sentence of article 2 (g);”. While there was some support for the suggestion, it was pointed out that that wording should also specify that an approval should emanate from a court having jurisdiction over a main proceeding of an enterprise group member, as was provided in the second sentence of draft article 2 (g).

18. Doubt was expressed as to whether the proposed amendments were necessary. It was suggested that instead subparagraph (a) of draft article 21, paragraph 2 could be expanded to refer to “the opening of the planning proceeding” or “the recognition of the planning proceeding” in addition to the appointment of the group representative. The prevailing view was that the text of draft article 21, paragraph 2, should be retained without change.

19. As regards draft article 23, some support was expressed for the proposal that paragraph 1 (b) should be redrafted as follows: “the proceeding is a planning proceeding within the meaning of the first sentence of article 2, subparagraph (g)”;

and that a new paragraph after paragraph 1 should be added reading: “Subject to the requirements of paragraphs 1 (a) to (c), the court may recognize the planning proceedings referred to in the second sentence of article 2 (g) as the planning proceeding.” It was explained that those changes were aimed at reflecting the second sentence of draft article 2 (g) that made recognition of stand-alone planning proceedings discretionary.

20. The prevailing view, however, was that the draft article should be retained without change. It was considered that automatic recognition should be envisaged also for stand-alone planning proceedings as long as conditions for recognition stipulated under article 23, paragraph 1, were met.

21. Views differed on whether recognition was discretionary or mandatory under draft article 23 and whether the recognizing State should have the power to examine merits of the decisions of a foreign court. Some delegations referred to their domestic practices of authorizing domestic courts to examine merits of foreign decisions before granting a recognition. In the view of other delegations, such practice would deviate from the provisions on recognition of the draft model law.

22. It was further indicated that the fundamental principle on which the draft model law was based was the recognition of the planning proceeding issued by the foreign court without any review of whether the conditions set out in article 2, subparagraph (g), were met as such assessment had already been made by the foreign court.

B. Decisions of the Working Group on the draft model law and the draft guide to enactment

23. The Working Group approved the text of the draft model law annexed to this report. The Working Group also approved the text of the draft guide to enactment contained in document A/CN.9/WG.V/WP.165 with amendments listed in paragraphs 13 and 14 (c) of this report. The Working Group agreed to submit both the draft model law and its guide to enactment for finalization and adoption by the Commission at its fifty-second session, in 2019.

V. Insolvency of MSMEs: consideration of a draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.166)

A. General statements

24. The Working Group recalled the mandate on the topic of MSMEs’ insolvency received from the Commission and agreed that A/CN.9/WG.V/WP.166 provided a useful starting point for deliberations. It was noted that that document was based on the UNCITRAL Legislative Guide on Insolvency Law, and might serve as a supplement to that Guide, but that the final form of the draft instrument had not been decided. It was mentioned that a final text might form part of a compilation of UNCITRAL texts addressing the legal aspects of MSMEs throughout their lifecycle.

25. A concern was raised that the content and structure of the instrument might vary depending on its final form. It was felt that, if the instrument was part of a compilation of texts on the lifecycle of MSME, then the link with the Legislative Guide would not be as close and a detailed treatment of insolvency issues would not be necessary. In response, it was noted that some fundamental issues such as discharge would need to be addressed regardless of the form of the instrument. It was reiterated that the substantive knowledge and expertise of the Working Group would be necessary for such an instrument, particularly in an effort to strike a balance between treatment of MSMEs and creditors in the insolvency regime.

26. It was felt that more information on the progress of work by Working Group I on issues of simplified incorporation would assist the Working Group with its deliberations. Noting that the Commission would decide the level of involvement of Working Group I, a possible joint session between the two working groups was considered useful for discussing issues related to insolvency of MSMEs.

27. It was observed that, regardless of its final form, an UNCITRAL instrument on MSME insolvency would have the potential to provide substantial value to a large sector of economies in most States. The Working Group noted such an instrument could provide for a novel legal regime for insolvency of MSMEs and contribute to related work of organizations such as WBG and IMF.

B. Scope and focus

28. In response to a query on whether medium-sized enterprises were to be covered, the Working Group was reminded of its decision to focus on micro and small business debtors in the first instance (A/CN.9/966, para. 118). It was informed that the same approach was taken by WBG that was working in parallel with UNCITRAL on a standard that would address insolvency of micro and small business debtors.

29. Views differed on feasibility and desirability of defining micro and small sized enterprises. The prevailing view was that each jurisdiction should address that issue in domestic legislation. The suggestion was made that the commentary preceding recommendation 271 might nevertheless discuss a distinction between micro and small business debtors. The view was expressed that the types of debtors to be covered by an instrument to be prepared by UNCITRAL on MSME insolvency mattered since solutions would be different depending on whether insolvency of individuals, partnerships or micro and small incorporated entities were addressed.

30. Numerous views were expressed criticizing the working paper for its perceived imbalance, with an excessive focus on simplification of insolvency proceedings and facilitating discharge and fresh start for micro and small business debtors, while failing to factor in the need for protection of creditors and general economic considerations. In response, it was explained that the paper had been prepared against the background of the UNCITRAL Legislative Guide on Insolvency Law and focused on the deviations from that general insolvency law which an enacting State might wish to consider when introducing a special insolvency regime for MSMEs. It was further explained that, as noted in paragraph 6 of the paper, the paper was prepared on the understanding that the key insolvency principles and the general guidance provided in the Guide remained relevant in the context of simplified insolvency regime and that the substance of the Guide would be applicable to simplified insolvency regimes with some variations noted in the paper. It was recalled that the Guide contained extensive discussion of notification, creditor protection, disclosure and other issues highlighted as important for ensuring a balanced approach in devising a simplified insolvency regime and that they were not repeated in the working paper.

31. The utility of such an approach was questioned since it did not convey the complete picture to intended users of the text. The view was expressed that such users would most likely be unexperienced on aspects of insolvency law and should be provided with incentives for proper compliance. It was further stated that the Working Group should aim at preparing a stand-alone document that would build on the Legislative Guide. Extensive cross-references to the Guide were not considered user-friendly, and it was suggested to reproduce the relevant parts of the Guide whenever the context so required, even if that meant expanding several recommendations. It was further noted that the focus should nevertheless remain on features unique to insolvencies of micro and small businesses.

32. Concerns were expressed also about the structure of the document, which followed the structure of the Legislative Guide. Such an approach, it was explained, risked overlooking many tools that might exist but were not addressed in the Guide or that might be devised for different types of micro and small business debtors. It

was suggested that the document might be structured around three basic tracks: discharge of debts for individuals, liquidation and reorganization. The alternative view was that discharge should not be seen as an option available only for individuals or only in the context of liquidation.

C. Comments on recommendations

Recommendation 271

33. While there was consensus on the importance of protecting creditors and achieving the right balance between interests of various stakeholders in the simplified insolvency context, different views were expressed on how to achieve that balance. A close link between access to credit by MSMEs and the protection of creditors was noted.

34. A point was made that in the light of characteristics of debtors for whom a simplified insolvency regime would most likely be devised, mechanisms for protection of creditors might differ from those found in standard insolvency regimes and that micro and small business debtors required special protection. Specific references were made to deviations from usual requirements as regards disclosure, voting and a creditors committee.

35. The following drafting suggestions were made with respect to recommendation 271: (a) reflect in the end of subparagraph (a) that a simplified insolvency regime should be put in place with due regard to creditors rights and due process; (b) add a subparagraph inviting States to define micro and small business debtors in their domestic law (a recommendation to that effect could alternatively appear among recommendations addressing eligibility); (c) refer to the importance of putting in place a system for early warning of financial difficulties and options available to micro and small business debtors to address them; (d) emphasize the importance of putting in place incentives for the active participation of creditors and negotiation of best workouts; and (e) refer to the importance of safeguards against possible abuses of simplified insolvency regime. Examples of possible safeguards were provided, including appointment of an insolvency representative who supervised a debtor in possession and minimum disclosure requirements, in particular as regards assets, debts and transfers.

36. The importance of out-of-court workouts was emphasized. It was noted that recommendation 272 addressed them.

Recommendation 272

37. The following suggestions were made with respect to that recommendation: (a) in the chapeau provisions, replace the opening words with the words “As a means of encouraging the early rescue of micro and small business debtors” and delete the words “all” and “on equitable terms”; (b) replace the words “Government support” with the words “neutral forum”; (c) reflect consistently that out-of-court debt restructuring proceedings were autonomous negotiations characterized by the lack of court involvement; (d) in that light, reassess the need for subparagraph (c); (e) consider difficulties of involving public creditors in out-of-court negotiations; (f) in subparagraph (d), delete the phrase “Allowing parties to” and reflect both notions – protection from avoidance and accordance of priority to interim finance; and (g) envisage the possibility of creating a hybrid proceeding and using out-of-court debt restructuring proceedings in different contexts.

Recommendation 273

38. The suggestion was made to delete that recommendation.

39. It was considered necessary to defer the consideration of recommendations 272 and 273 until after features of simplified in-court insolvency proceedings had been discussed.

Recommendation 274

40. The following suggestions were made with respect to that recommendation: (a) reflect that a creditor committee would not be required; (b) reflect the importance of online tools and templates for simplified and expedited procedures; (c) add recommendations on stay, simplified notification of creditors, and simplified procedures for review and approval by creditors and courts; (d) clearly distinguish between procedures that would be applicable only to simplified liquidation and procedures that would be applicable only to simplified reorganization (e.g., simplified procedures for submission, verification and admission of claims might be appropriate in simplified reorganization but not in simplified liquidation); (e) eliminate repetition between subparagraph (b) and recommendation 276 by referring in subparagraph (b) to simplified documentation submission and other features of simplified commencement, such as the use of templates, electronic filing, electronic forms and assistance with filling in them. It was considered that those features expedited the process more than imposition of shorter timelines.

41. It was noted that shorter timelines with narrow grounds for their extension, as envisaged in subparagraph (a), would help to free market share and facilitate reallocation of resources of a failed business for new activity, but an alternative view was that mandatory deadlines could lead to manipulation in the negotiation process. It was also felt that the Working Group would need to further consider what sanctions would be appropriate if mandatory timelines were not met. The automatic conversion of a simplified proceeding to an ordinary one, it was said, might not be an appropriate consequence. It was also suggested that the draft text should envisage no or very short time gap between the application for commencement and the commencement of proceedings.

42. It was suggested that paragraph 53 should exclude from a discharge not only claims intentionally omitted, but also those omitted by mistake.

Recommendation 275

43. Views differed with respect to the reference in the recommendation to “exceptional circumstances” that would justify the commencement of the simplified insolvency proceeding by a party in interest other than the debtor. Some delegations considered that it would be desirable to specify such “exceptional circumstances”, or alternatively the circumstances when the debtor alone would have the right to commence simplified insolvency proceedings. Other delegations were of the view that no special circumstances to allow creditors to commerce proceedings would need to be specified.

44. There was support for the need to differentiate procedures applicable to insolvency of natural persons from those applicable to micro and small business companies, which was considered to be a recurrent issue throughout the document. The view was expressed that, as drafted, the recommendation applied to insolvency of natural persons and would prevent creditors from commencing insolvency proceedings against a micro or small enterprise.

45. It was felt that the text should include safeguards against abuse of rights to commence simplified proceedings. Sanctions were felt to be an appropriate consequence, and a suggestion was made to change the word “may” to “should” in the second sentence. The denial of a simplified proceeding itself, or access to future proceedings, was suggested as an alternative consequence. The other view was that the second sentence should be deleted.

Recommendation 276

46. It was stated that the cessation of payment test was more appropriate for micro and small business debtors than the balance sheet test. Another view was that a rebuttable presumption of insolvency of the debtor filing for insolvency might expedite procedures, but it should be coupled with the obligation on the debtor to

provide basic financial information to the creditors to enable them to challenge that presumption.

47. The suggestion was made to consider: (a) when debtors would have the right to avail themselves of simplified insolvency proceedings; (b) under what circumstances debtors would have an obligation to file for insolvency; and (c) when creditors would have the right to apply for commencement of insolvency proceedings. It was explained that the debtor would have the right to apply for commencement of a simplified insolvency proceeding at an early stage of financial distress but would be obliged to do so at the stage of cessation of payments, at which point the creditors would also be eligible to apply for commencement of an insolvency proceeding. It was stated that the suggested approach might necessitate merging recommendations 275 and 276.

Recommendations 277–279

48. It was noted that recommendations 277 to 279 addressed reorganization. It was suggested to add recommendations on zero-asset proceedings, simplified liquidation and expedited proceedings. Support was expressed for also including a recommendation on elimination of the priority status of tax claims as an important measure for achieving successful reorganization. It was also suggested that recommendations related to reorganization should address an exception to the absolute priority rule in order to allow the debtor to continue using its property after the plan was confirmed unless the plan provided otherwise. It was also considered useful to reflect that, without debt to equity swap, it might be difficult or impossible to achieve successful reorganization but options to recover ownership rights over business might be provided. The importance of other laws and institutional measures on successful reorganization were also highlighted.

Recommendation 277

49. The following comments were made with respect to that recommendation: (a) reconsider the use of the phrase “demonstrate the value of continuation of business” given the ambiguity in the words “demonstrate” and “value”; (b) discuss at which stage viability of business was to be assessed and under which terms, including presentation of basic information and a plan; (c) acknowledge the difficulty of proving viability and the associated costs, in particular where independent evaluation would be needed; (d) consider that proving “non-viability” might be easier; (e) avoid creating barriers for early access to insolvency proceedings by requiring the proof of viability at the outset; (f) ensure that creditors rights were not affected by an automatic stay, and that creditors had the right to object where viability was to be ascertained at later stages in the process; (g) allow for a mechanism to filter out clearly non-viable businesses sufficiently early in the process; (h) preserve flexibility between liquidation and reorganization, while acknowledging that reorganization would not be common in the micro and small business debtor context; and (i) address consequences of disputes arising as regards assessment of viability, the role of the court and allocation of burden of proof.

50. Support was expressed for replacing the current wording of the recommendation with the following wording: “The insolvency law should provide that if a continuation of business is sought, the debtor should submit to creditors a plan that specifies its proposed steps to return the business to viability and to address creditors’ claims.” Such alternative wording presupposed that the debtor should persuade creditors that the business was viable and that the creditors would be able to object. Points were made that the proposal did not capture a sale as a going concern and the phrase “return to viability” presumed that business was not viable in the first place.

51. Subsequently, it was proposed that a similar text for cases of liquidation might read as follows: “The insolvency law should provide that if liquidation is sought, the applicant (debtor or creditor) should propose the steps for simplified liquidation, including disclosure to creditors of assets, liabilities and recent transfers, the process

for sale of assets, and the process to pay creditors' claims." It was stated that creditors would be given the right to object to the court if they did not agree with the liquidation plan.

Recommendation 278

52. The following comments were made with respect to that recommendation: (a) debtor in possession might not be always an appropriate solution because poor management might have caused insolvency, and third-party oversight or involvement in the management of insolvent debtor business might therefore be required; and (b) not to limit possible sources for subsidization of such third party's services to public funds (alternatives might include pro bono services by specialized organizations and services of retired professionals).

Recommendation 279

53. The following comments were made with respect to that recommendation: (a) not to lower requirements for creditor approval and disclosure, at the same time recognize that less information would be required to be disclosed and certain formalities, such as disclosure statement hearings could be dispensed with if creditors approved the plan; (b) identify minimum information that would need to be disclosed; (c) preserve a voting requirement for the approval of the plan, at the same time address issues of passivity and absenteeism of creditors (through e.g., deemed approval and online tools); and (d) acknowledge however that there might exist simplified insolvency regimes where voting would be superfluous.

Recommendation 280

54. The following comments were made with respect to that recommendation: (a) not to convey that the need for avoidance actions would automatically lead to conversion of simplified insolvency proceeding to a standard insolvency proceeding; (b) acknowledge that there might be other reasons for conversion (e.g., because eligibility or other requirements of a simplified insolvency regime were not fulfilled) and that conversion from reorganization to liquidation would not raise novel issues; (c) consider that modifications in the same type of proceeding might be necessary (e.g., recourse to mediation and involvement of an insolvency representative where it was previously not involved); (d) emphasize importance of preserving flexibility as regards conversion (as opposed to termination of old proceedings and commencement of new proceedings) for creditors to allow them to comply with statutory limitations; (e) at the same time avoid conveying that a standard insolvency proceeding was a punishment; and (f) envisage in simplified insolvency proceedings mechanisms to deal with avoidable transactions.

55. In order to address some of those comments, a suggestion was made to change the text of recommendation 280 to the following: "The law may provide for transition from simplified restructuring to simplified liquidation or may adopt other tools to specifically address, within the proceeding, avoidance transactions."

Recommendations 281 to 283

56. The prevailing view was that there was no need for those recommendations. A view was expressed that nevertheless a text on insolvency of micro and small business debtors should address rebuttable presumptions on exclusion of certain assets from the insolvency estate of micro and small business debtors. It was also considered necessary to address in more detail aspects of discharge such as conditions for discharge, limitations to exemptions from discharge and sanctions for abuses of a discharge regime, not in isolation but in the context of other aspects of a simplified insolvency regime.

57. The Working Group decided to recommend to Working Group I (MSMEs) that, in the context of its current work on a draft legislative guide on an UNCITRAL

Limited Liability Organization, it should consider recommending to States that their domestic law should clearly delineate personal and company assets in their domestic law.

D. Decisions

58. The Secretariat was requested to prepare a new text on a simplified insolvency regime reflecting deliberations of the Working Group. That text, it was suggested, could take the form of a list of principles applicable to a simplified insolvency regime that would supplement the texts of UNCITRAL Working Group I (MSMEs).

59. The Working Group was of the view that more time for additional work, whether in session or between sessions, including consultations and the appropriate use of expert groups, to make progress on that work would be required. Reference was made to the upcoming adoption and entry into force of a regional instrument that would have implications on that work.

VI. Proposals for possible future work by UNCITRAL in the area of insolvency law

60. The Working Group was informed that the Commission, at its fifty-second session, in 2019, would have before it for consideration two proposals on possible future work in the area of insolvency law: one submitted by the European Union on harmonizing applicable law in insolvency proceedings (A/CN.9/995) and the other submitted by the United States to call a colloquium and thereafter commence work on the development of model legislative provisions on civil asset tracing and recovery in both common and civil law systems (A/CN.9/996).

A. Proposal of the European Union on harmonizing applicable law in insolvency proceedings

61. Wide support was expressed for recommending to the Commission to undertake work on harmonizing applicable law in insolvency proceedings and allocate it to Working Group V in the light of its expertise on insolvency law as well as importance and relevance of the topic for implementation of UNCITRAL insolvency texts, cross-border insolvency cooperation, rescue of enterprises and prevention of forum shopping. It was considered premature to recommend any form that the work on that topic might take. If the Commission decided to take up that topic, it was considered essential to ensure close coordination between UNCITRAL, the Hague Conference on Private International Law and the European Union.

62. However, the view was also expressed that the topic could be more appropriately dealt with by the Hague Conference. In response, it was observed that the Hague Conference had consistently carved out issues of insolvency from its work program and work products.

63. A view was expressed that more research was needed, in particular on domestic practices with addressing choice of law in insolvency proceedings. Concern was expressed that the proposal touched upon such sensitive issues as treatment of intellectual property rights, priority of claims, rights in rem and security interests in insolvency.

B. Proposal of the United States of America on asset tracing and recovery

64. The great importance of the topic was recognized and support was expressed for the proposal, but there were differing views on the advisability for the Commission to undertake work on asset tracing and recovery in insolvency proceedings. It was

said that it was not clear how a project on that topic could be delineated from criminal law, other areas of law where asset tracing and recovery were also important (e.g., family law, enforcement and inheritance) and existing international instruments. Nevertheless, holding a colloquium on that topic was considered advisable without prejudice to the Commission's decision subsequent to the colloquium on whether the work on that topic should be undertaken.

65. The view was expressed that such a possible colloquium should nevertheless not be limited to that topic and might address other topics, including choice of law and cryptocurrencies in insolvency. A view was also expressed that the Working Group might undertake, as in the past, work on several topics in parallel.

C. Preparation of a technical assistance note on enactment of UNCITRAL model laws on insolvency

66. The Working Group recalled that at its fifty-fourth session (December 2018), it requested the Secretariat to prepare a note for use in its technical assistance activities that would purport to assist States with the enactment of MLEGI alongside the MLCBI and the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments. It was also recalled that at that time the approval of the Working Group of the project was not considered necessary (A/CN.9/966, para. 109). It was explained that the request of the Working Group to the Secretariat would be considered by the Commission at its fifty-second session, in 2019, in the context of the overall work programme of UNCITRAL and allocation of resources of its secretariat to UNCITRAL legislative and non-legislative work.

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 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 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 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. Appointment of a group representative and 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 this article and 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 presume 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 insolvency 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 and other interested persons

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 that might otherwise be brought in a non-main proceeding 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 that might otherwise be brought in a proceeding 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.