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Facilitating the cross-border insolvency of multinational enterprise groups: summary

Note by the Secretariat

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I. Introduction

1. This note provides a summary of how the three sets of provisions contained in the following documents work in combination: (a) the key principles for facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.133); (b) the draft legislative provisions on the cross-border insolvency of enterprise groups (arts. 8-18 from A/CN.9/WG.V/WP.128 and arts. 2-7 from A/CN.9/WG.V/WP.134); and (c) the joint proposal made at the forty-eighth session of Working Group V (A/CN.9/864, paras. 38-53). The combined provisions are organized into chapters according to the structure agreed by the Working Group at its forty-eighth session.[1]

2. Accordingly, chapters 1 to 4 are the core provisions, which address scope and definitions; coordination and cooperation; facilitating the development, recognition and implementation of a group insolvency solution; and the treatment of foreign claims in main proceedings in accordance with the law applicable to those claims (so-called “synthetic proceedings”).[2]

3. Chapter 5 contains supplemental provisions, which address the effect of the treatment of creditor claims in a foreign insolvency proceeding referred to in paragraph 2 on the relief that may be ordered in a creditor’s home State, as well as an approach to approval of a group insolvency solution based on adequate protection of creditors. The proposal notes (A/CN.9/864, para. 49, footnote 1) that those provisions, which would be optional for a State to enact, would go a step further than the core provisions. They would permit a court in one jurisdiction to use so-called “synthetic proceedings” for a group member whose centre of main interests (COMI) is located in a different jurisdiction. They would also allow a court to provide additional relief — staying or declining to commence insolvency proceedings, as well as approving the relevant portion of a group insolvency solution without submitting it to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

4. The proposal further notes that the use of the supplemental provisions might result in a group member’s insolvency being handled in a manner that was not consistent with the prior expectations of creditors and other third parties, i.e. that the group member would be subject to normal insolvency proceedings in its COMI jurisdiction. As a consequence, departing from that basic principle of proceedings commenced on the basis of COMI should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency largely outweigh any negative effect on creditors’ expectations in particular and legal certainty in general. That would only appear to be justified:

(a) In jurisdictions where courts traditionally hold a large degree of discretion and flexibility in conducting insolvency proceedings;

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[1] See A/CN.9/864, para. 18.

[2] The term “synthetic proceedings” is not used in the draft articles set forth in A/CN.9/WG.V/WP.137/Add.1. What is referred to is the substance of what transpires when that approach is used, for example, commitment to and approval of the treatment of foreign claims in proceedings in this State in accordance with the law applicable to those claims.

(b) Where the enterprise group in question was closely integrated and therefore the benefit of so-called “synthetic proceedings” in lieu of main proceedings (conducted at the COMI) was obvious; and

(c) Where the use of the proceedings under articles A to G (if available), could not achieve a similar result.

5. Within chapters 3 to 5, the provisions have been divided into two categories. Category A provisions would be required in the State in which the main or planning proceeding commences in order to facilitate the development of a group insolvency solution through that proceeding (this might be referred to as the originating State). These provisions are of the kind that might be added to the national insolvency law of that State and reflect some of the elements of part three, chapter II of the Legislative Guide. Category B provisions would be required to facilitate cross-border recognition of that planning proceeding and implementation of a group insolvency solution in another State (this might be referred to as the receiving State). These are provisions that might be added to a cross-border recognition regime, such as provided by the Model Law. The provisions in chapter 2 on cooperation and coordination are largely based upon the provisions of the Model Law and part three, chapter III of the Legislative Guide. As such, the enacting State could be both an originating and a receiving State, depending on the circumstances.

6. Document A/CN.9/WG.V/WP.137/Add.1 contains the substantive provisions referred to in the summary, organized in accordance with the agreed structure.

7. The summary refers to the following fact scenario:

> Debtors 1 to 4 are all members of an enterprise group. Debtors 1 and 2 have their COMIs in State A. Insolvency proceedings commence in State A for debtors 1 and 2. Debtor 3 has its COMI in State B and debtor 4 has its COMI in State C.

II. Summary of the combined draft provisions on facilitating the cross-border insolvency of multinational enterprise groups

Chapter 1. General provisions

1. Principles 1 bis and 1.

2. Article 1. Scope.

3. Definitions.

Chapter 2. Coordination and cooperation

Articles 9-18 (A/CN.9/WG.V/WP.128)

4. The courts can coordinate and cooperate with each other, with a group representative (GR) and any foreign representative[3] of a group member participating

[3] As defined in UNCITRAL Model Law on Cross-Border Insolvency, art. 2(d).

in a planning proceeding (for the purpose of developing the group insolvency solution); the GR and foreign representatives can also cooperate and coordinate between themselves and with the courts.

Chapter 3. Facilitating the development and implementation of a group insolvency solution

A. Provisions relevant to the State in which a planning proceeding commences (i.e. State A concerning debtors 1 and 2)

5. Debtors 3 and 4 can "participate"[4] in a planning proceeding[5] commenced in State A for debtors 1 and 2 in order to develop a group insolvency solution,[6] provided the courts in States B and C [permit] [do not preclude] that "participation",[7] see below paragraph 10.

6. When debtors 3 and 4 are participating in the planning proceeding in State A, the court in State A can appoint a GR to represent that proceeding[8] and authorize the GR:

(a) To seek recognition of the planning proceeding commenced in State A in a foreign State (e.g. States B and C);[9] and

(b) To participate in any proceedings relating to debtors 3 and 4 taking place in a foreign State (e.g. States B and C),[10] including where those proceedings relate to approval of the group insolvency solution.[11]

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[4] The notion of "participation" may need to be explained, since much of substance in the draft text arises from participation in the proceedings in State A. Two distinctions may need to be made between the type of group member participating (i.e. solvent or insolvent) and what they are actually participating in — the planning proceeding or the negotiation of the group insolvency solution. Participation by a solvent group member should be voluntary (see Legislative Guide, part three, paras. 11-14 and 152, rec. 238) and in many cases that member may only need to participate in the negotiation of the group insolvency solution (rather than the planning proceeding in State A), to which they would be contractually bound. Where participation relates to the planning proceeding, it raises issues of the approvals that are required in each case, as well as the concerns previously raised (A/CN.9/835, para. 27) with respect to the standing of solvent and insolvent group members to appear and be heard in the proceedings in State A, as well as submission to the jurisdiction of the courts of State A and the relevance of art. 10 of the Model Law. The issue of participation, particularly where it arises in the period approaching insolvency of a group member has implications for the duties of directors of insolvent group members that might need to be considered in the text being developed on that issue.

[5] As defined in art. 2, para. (g) in A/CN.9/WG.V/WP.137/Add.1.

[6] Art. B, para. 1; principles 2, 3 and 5.

[7] Principle 1 bis (b); principle 4, para. 1(i); art. B, para. 2.

[8] Art. B, para. 3.

[9] Art. B, para. 3.

[10] Art. B, para. 3; since the GR appears to have no legal relationship to debtors 3 and 4, participation in the proceedings in States C and/or D, could be based upon recognition of the planning proceeding in State A (see art. D, para. 1 and art. 12 of the Model Law).

[11] Principle 8.

7. In the planning proceeding in State A relating to debtors 1 and 2, the recommendations of part three of the Legislative Guide on joint application (rec. 199) and procedural coordination (recs. 202-210) might apply.[12]

8. The court in State A can order relief affecting the assets of debtors participating in the planning proceeding in State A (i.e. debtors 3 and 4) to support the development of the group insolvency solution through that proceeding.[13]

9. The court in State A can receive a request for recognition of any proceedings taking place in a foreign State (e.g. States B and C) concerning debtors participating in the planning proceeding in State A (e.g. these could be non-main proceedings with respect to debtors 1 and 2, and main or non-main proceedings with respect to debtors 3 and 4).[14]

B. Provisions relevant to the State in which recognition of a planning proceeding is sought (i.e. States B and C)

10. Courts in States B and C can [permit] [not preclude] "participation" of debtors 3 and 4 in a planning proceeding in State A where a group insolvency solution is to be developed.[15]

11. Courts in States B and C can authorize an insolvency representative appointed in proceedings relating to participating debtors (e.g. debtors 3 and/or 4) to seek recognition of those proceedings in State A.[16]

12. A GR can apply for recognition in States B and C (and other States as relevant) of the planning proceeding in State A.[17] Recognition shall be granted if the specified requirements are met.

13. After an application for recognition has been made in States B and C, interim relief relating to the assets (located in States B and C) of debtors 1 and 2 is available

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[12] Principle 5.

[13] Art. D, para. 2; this relief appears to relate only to the assets etc. of foreign debtors that are located in or subject to the jurisdiction of State A (see comment in respect of art. D, para. 2 in A/CN.9/WG.V/WP.137/Add.1).

[14] Principle 4, para. 2 — this relief might be covered by provisions of the Model Law, if enacted in State A.

[15] Principle 4, para. 1(i); art. B, para. 2. It may be preferable to draft this provision as permissive, rather than preclusive. If the enacting legislation does not authorize such participation, following an approach similar to art. 5 of the Model Law, the court may be requested to provide that permission (it may be noted that some States, in enacting art. 5 of the Model Law, have adopted that approach and require the court to approve a representative seeking assistance in a foreign State).

[16] Principle 4, para. 1(ii) — this is probably covered by the Model Law, as would be acceptance of that request for recognition in State A (see para. 9 above and principle 4, para. 2 in A/CN.9/WG.V/WP.137/Add.1).

[17] Art. C; art. 3.

to assist that proceeding[18] and, following recognition, additional relief can be granted.[19]

14. In granting, modifying or terminating the relief referred to in paragraph 13, the interests of creditors and other interested persons are to be adequately protected.[20]

15. Upon recognition of the planning proceeding, the GR can participate in any proceeding taking place in States B and C relating to debtors 3 and 4 on the basis that they are participating in the proceedings in State A.[21]

16. Once a group insolvency solution is developed in State A, the GR submits the solution to the courts of States B and C, which are then responsible for submitting the parts affecting debtors 3 and 4 to the relevant approval process and implementation.[22]

17. The GR has a right of access to the proceedings in States B and C to be heard on issues related to implementation of the group insolvency solution.[23]

Chapter 4. Treatment of foreign claims in accordance with applicable law[24]

18. A foreign representative or GR may commit to, and the court may approve, treatment of any foreign claims in proceedings in this State in accordance with the treatment[25] they would receive in any foreign non-main proceeding under the applicable foreign law.[26]

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[18] Art. 6.

[19] Art. 7. Arts. 6 and 7 currently appear to be limited to protecting the assets etc. of the group member that is "subject to a foreign proceeding"; in the scenario above that would be the assets of debtors 1 and 2 that are located in States B and C; it does not appear to relate to the assets of participating debtors 3 or 4. The relief provided by art. D, para. 2 (see para. 8 above) appears to relate to relief that might be granted by the court of State A with respect to assets of participating debtors 3 and 4 that might be located in State A where the planning proceeding is taking place. As currently drafted, it appears not to apply to the relief that might be available to the GR with respect to the assets located in States B and C of debtors 3 or 4 that might be required to assist the development of the group insolvency solution. Art. H, paras. 1 and 2 seem to refer to such relief being available at the time of approval of the group insolvency solution in States B and C. If art. D is to apply in States A, B and C with respect to the assets of debtors 1-4, some revision of the drafting might be required to clarify that point.

[20] Art. 8.

[21] Art. D, para. 1; Participation by the GR in any insolvency proceedings relating to debtors 1 and 2 taking place elsewhere might be covered, following recognition, by art. 12 of the Model Law.

[22] Art. E; principles 6 and 7.

[23] Principle 8.

[24] The ch. 4 provisions are not limited to cases where a group insolvency solution is being developed through a planning proceeding.

[25] The standard for that treatment, which focuses on the priority accorded under the applicable foreign law, might be that the creditors should be no worse off under that treatment than they would have been if non-main proceedings had commenced. This issue was previously discussed in the Working Group, see A/CN.9/803, paras. 17 and 21(b), and A/CN.9/829, para. 41.

[26] Art. F, para. 1 as proposed (see A/CN.9/864, para. 48).

19. The court in this State may stay or decline to commence a non-main proceeding in this State where a commitment in accordance with paragraph 18 has been made by a foreign representative or a GR in the relevant foreign proceeding.[27]

Chapter 5. Supplemental provisions[28]

20. The commitment in paragraph 18 may also be made with respect to the treatment a claim would receive in a foreign main proceeding.[29]

21. The court in this State may stay or decline to commence a main proceeding where a commitment in accordance with paragraph 18 has been made by a foreign representative or a GR in the relevant foreign proceeding.[30]

22. As a variation upon the approval process in paragraph 16, the courts in States B and C can approve the relevant portion of the group insolvency solution relating to debtors 3 and 4 and grant appropriate relief of the type referred to in article D, paragraph 2, if satisfied that the interests of creditors of the affected group members (i.e. debtors 3 and 4) are adequately protected in the planning proceeding.[31]

23. After recognizing the planning proceeding in State A, the courts in States B and C can, provided the interests of creditors of affected group members (i.e. debtor 3 and 4) are protected in the planning proceeding, order relief of the kind referred to in article D, paragraph 2 and stay or decline to commence any proceedings in States B and C concerning debtors 3 and 4 respectively.[32]

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[27] Art. F, para. 2 as proposed (see A/CN.9/864, para. 48). It might be noted, however, that a proposal made at the forty-eighth session (A/CN.9/864, para. 50(d)) suggested that art. F. para. (2) should be considered a supplemental rather than a core provision. Accordingly, arts. F, para. 1 and G, para. 1 could be combined as a core provision, while arts. F, para. 2 and G, para. 2 should be supplemental provisions. This proposal is reflected as a variant in A/CN.9/WG.V/WP.137/Add.1, footnote 50.

[28] A separate scope provision for chapter 5 could be drafted and include the material currently reproduced in paras. 3 and 4 of the introduction to this note.

[29] Art. G, para. 1 as proposed (see A/CN.9/864, para. 48).

[30] Art. G, para. 2 as proposed (see A/CN.9/864, para. 48); principle 1. Previous discussion in the Working Group referred to the court taking such action on the basis of certain considerations, e.g. after balancing the interests of the global group against protecting the interests of local creditors (see A/CN.9/803, para. 28).

[31] Art. H, para. 2.

[32] Art. H, para. 1; principle 1.