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Enterprise group insolvency: draft model law

Note by the Secretariat

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I. Introduction

1. The background to this work is set forth in document A/CN.9/WG.V/WP.160, paragraphs 5 to 8.
2. The draft text of the model law set out in this document reflects the discussion and decisions taken at the fifty-third session of the Working Group (A/CN.9/937) and revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text.

General drafting issues

3. It may be appropriate to consider whether the words “[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]” as used in a number of articles, including articles 8, 13, 14, 15, 19, 21, 23 and 26, might be simplified by replacing them with a reference to “an insolvency representative appointed in this State” or to “insolvency representatives appointed in this State” (as appropriate). Since “insolvency representative” is a defined term (see draft art. 2(i)), which reflects the elements of the words included in square brackets, the change would improve the consistency of the use of terminology throughout the text, in addition to assisting its readability.
4. To further ensure consistency across the text, the references in square brackets in articles 4, 17 and 24 to a proceeding “under [identify laws of the enacting State relating to insolvency]”, could be replaced with “an insolvency proceeding” (a new definition of that term — art. 2(h) — has been added, based upon the definition in the Legislative Guide, which already includes the words “pursuant to a law relating to insolvency”). Given the complexity of the drafting of some elements of the draft model law, it may facilitate understanding and readability of the model law if this simpler formulation were to be consistently used. An appropriate note could be included in the guide to enactment clarifying, among other things, that use of that formulation is not intended to signify a different approach or interpretation from that of the Model Law on Cross-Border Insolvency (MLCBI), but rather to simplify the text.
5. It may be further appropriate to consider adding the word “foreign” before the words “planning proceeding” in chapter 4, to add greater clarity to the text and ensure a clear distinction between chapters 3 and 4.
6. Since the text uses the word “proceeding” in different contexts (e.g. “insolvency” and “planning”), it may be helpful to more clearly specify which type is being referred to in each instance. To that end, the word “insolvency” has been added to several articles.

II. Draft model law on enterprise group insolvency

Part A. Core Provisions

Chapter 1. General Provisions

Preamble

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

- (a) Cooperation between courts and other competent authorities of this State and foreign States involved in [those] cases [of cross-border insolvency affecting enterprise group members];
- (b) Cooperation between insolvency representatives appointed in this State and foreign States in [those] cases [of cross-border insolvency affecting enterprise group members];

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

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

(e) Protection and maximization of the overall combined value of the operations and assets 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 [and other relevant stakeholders] of each enterprise group member participating in a group insolvency solution.

Notes on the preamble

1. The substance of the preamble as drafted was approved at the fifty-third session (A/CN.9/937, para. 52). The Working Group may wish to consider deleting the words “of cross-border insolvency affecting enterprise group members” in subparagraphs (a) and (b) as indicated in square brackets, as they repeat the content of the chapeau to the preamble. If so, the word “those” could be added before the word “cases” to reflect the wording of the chapeau. The Working Group may also wish to consider whether there is a need to better reflect, in subparagraphs (a) and (b), the substance of chapter 2 by including, for example, references to “a group representative, where appointed”.

2. The Working Group may also wish to consider addition of the words “of those enterprise group members” in subparagraph (d) to provide slightly more specificity as to the creditors being referred to and to align the drafting with subparagraph (g), which identifies specific creditors. The Working Group may also wish to consider whether words along the lines of “and other relevant stakeholders” might be added to subparagraph (g) to align it more closely with the drafting of article 25.

Article 1. Scope

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

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

Notes on article 1

3. Draft article 1 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 53). Paragraph 2 has been added to accommodate exclusions from the scope of the model law that States may wish to make, analogous to article 1, paragraph 2 of MLCBI.

Article 2. Definitions

For the purposes of these provisions:

(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 set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the operations or assets of one or more enterprise group members, with the goal of preserving or enhancing the overall combined value of those enterprise group members;

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

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

(ii) The enterprise group member subject to the insolvency proceeding is a necessary and integral part of that group insolvency solution; and

(iii) A group representative has been appointed;

(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) “Foreign representative” means an insolvency representative authorized in a foreign insolvency proceeding;

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

(l) “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 (m) of this article; and

(m) “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.

Notes on article 2

4. Draft article 2 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, paras. 54–55). The words at the end of subparagraph (f) have been revised. A number of new definitions (subparas. (h)-(m)) have been added. These are based on definitions in MLCBI, with addition of the words “enterprise group member” before the word “debtor” in each definition.

5. With the addition of the definition of “main” proceeding, the definition of “planning proceeding” does not need to refer to centre of main interests, but rather to the fact that that proceeding is a main proceeding. That change has been made to the drafting of subparagraph (g).

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.

Notes on article 3

6. Article 3 is a new article, added to the draft model law in accordance with the report of the fifty-third session (A/CN.9/937, para. 58), and in view of the decision to finalize the draft text as a model law. It mirrors article 3 of MLCBI.

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

Where the centre of main interests of an enterprise group member is located 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;

Variant 1 of subparagraph (c)

(c) Limit the commencement of proceedings in this State under [*identify laws of the enacting State relating to insolvency*], if required or requested to address the [insolvency] [financial distress] of that enterprise group member; or

Variant 2 of subparagraph (c)

(c) Limit the commencement of insolvency proceedings in this State, if required or requested to address the [insolvency] [financial distress] of that enterprise group member; 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 [under the law of the enacting State].

Notes on article 4 (2bis)

7. Article 4 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 56), in particular, by revising subparagraph (d) to include a reference to "that" enterprise group member as referred to in the chapeau.

8. With respect to the drafting of subparagraph (c) and the use of the italicized words in square brackets (see the drafting note in para. 3 of the introduction above), the 2 variants of the subparagraph indicate how the drafting might appear. The Working Group may also wish to consider whether the word "insolvency" should be used to refer to the financial status of the enterprise group member, given that not all laws require a debtor to be insolvent to commence an insolvency proceeding. An alternative might be to refer to the "financial distress" of the group member. It might be noted in that regard that the definition of "insolvency proceeding" does not require the debtor to be insolvent.

9. The Working Group may wish to consider whether the words in square brackets at the end of subparagraph (d) referring to the law of the enacting State might be added to give greater clarity to the subparagraph.

Article 5 [2 quater]. Competent court or authority

The functions referred to in this Law relating to the recognition of [an insolvency proceeding or] a [foreign] planning proceeding and cooperation with foreign courts, [insolvency representatives and a group representative appointed in a

State other than this State] shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Notes on article 5

10. The Working Group may wish to consider the drafting of article 5, in particular:

(a) The need for the reference to recognition of “an insolvency proceeding”, which is not specifically covered in this model law — chapter 4 deals only with the recognition of a foreign planning proceeding; and

(b) Whether the words included in square brackets referring to cooperation with insolvency representatives and a group representative appointed in a State other than the enacting State should be added, given that, in terms of cooperation, the model law is broader than just cooperation with foreign courts, as indicated in articles 8 to 14.

Article 6 [2ter]. 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.

Notes on article 6

11. Article 6 was approved as drafted at the fifty-third session (A/CN.9/937, para. 57).

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.

Notes on article 7

12. Article 7 is a new article, added to the draft model law in accordance with the report of the fifty-third session (A/CN.9/937, para. 58), and in view of the decision to finalize the draft text as a model law. It mirrors article 8 of MLCBI.

Chapter 2. Cooperation and coordination

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

Variant 1 of paragraph 1

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, where appointed, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court.

Variant 2 of paragraph 1

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts, insolvency representatives and a group representative, where 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, foreign courts, [foreign] [insolvency] representatives or a group representative, where appointed.

Notes on article 8

13. Variants 1 and 2 of paragraph 1 indicate how the article might be drafted to accommodate the drafting changes suggested in paragraph 3 of the introduction to this Note, as well as to address the following issue.

14. In paragraphs 1 and 2, the reference to a “foreign representative” might be replaced with “insolvency representative” to ensure that the text is broad enough to cover the possibility that cooperation and direct communication might concern, in addition to foreign insolvency representatives, any insolvency representative appointed for a group member in the same State as the group representative. Using the phrase “insolvency representative” should be sufficiently broad to cover both locally and foreign appointed insolvency representatives, and could be explained in the guide to enactment. This issue applies to other draft articles, including 9(b), 12(1) and (2), 13(1) and (2).

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

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

- (a) Communication of information by any means considered appropriate by the court;
- (b) Participation in communication with a foreign court, a[n insolvency] [foreign] representative or a group representative, where 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 located in different States, 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 cross-border 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 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*].

Notes on article 9

15. For greater clarity, the Working Group may wish to consider:

- (a) Adding the word “insolvency” before the word “proceedings” in subparagraphs (d) and (f);
- (b) Replacing the word “foreign” in subparagraph (b) with a reference to an insolvency representative, as noted in paragraph 14 above; and
- (c) The placement of subparagraph (f) and its relationship to draft article 15, see the notes below under draft article 15 (the same issues arise with respect to draft art. 14, subpara. (b)).

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

1. With respect to communication under article 8, the court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.
2. Participation by a court in communication pursuant to article 8, paragraph 2, does not imply:
 - (a) A waiver or compromise by the court of any powers, responsibilities or authority;
 - (b) A substantive determination of any matter before the court;
 - (c) A waiver by any of the parties of any of their substantive or procedural rights;
 - (d) A diminution of the effect of any of the orders made by the court;
 - (e) Submission to the jurisdiction of other courts participating in the communication; or
 - (f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.

Article 11 [6]. Coordination of hearings

1. The court may conduct a hearing in coordination with a foreign court.
2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.
3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

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

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 foreign courts and [foreign] [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 foreign courts and [foreign] [insolvency] representatives of [other] enterprise group members.

Notes on article 12

16. Article 12 as drafted was approved at the fifty-third session (A/CN.9/937, para. 62). However, the Working Group may wish to consider the following drafting suggestions:

- (a) Addition of the words “appointed in this State” to the heading of the draft article to conform the drafting with paragraph 1;
- (b) As noted above in paragraph 14, whether the language of the article as currently drafted is sufficient to cover the possibility that cooperation and direct communication might concern, in addition to foreign insolvency representatives, any insolvency representative appointed for a group member in the same State as the group representative; and

(c) Whether the reference to cooperation with foreign courts should be extended to include courts in the enacting State that might be supervising insolvency proceedings with respect to group members that are not participating in the planning proceeding.

17. To address these issues and avoid complexity in the drafting, the text might be revised by replacing the reference to “foreign courts” with “other courts” (thus referring to all courts other than the court appointing the group representative in this State) and replacing the word “foreign” where it appears before the word “representative” with “insolvency” (thus referring to insolvency representatives of group members, without any reference to their location). The guide to enactment might explain the intended scope of the provision.

18. The Working Group may also wish to consider deleting the word “other” in both paragraphs in relation to group members of the draft article; since the group representative is not a representative of a particular group member, but rather of the planning proceeding, the reference to “other” group members creates uncertainty.

19. With those amendments, article 12, paragraph 1, might read:

“A group representative appointed by a court 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 with insolvency representatives of enterprise group members to facilitate the development and implementation of a group insolvency solution.”

20. Similar revisions could be made to article 12, paragraph 2, as indicated in square brackets.

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

1. A[n insolvency representative appointed in this State] [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts, [foreign] [insolvency] representatives of other enterprise group members and a group representative, where appointed.

2. A[n insolvency representative appointed in this State] [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] 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 foreign courts, [foreign] [insolvency] representatives of other enterprise group members and a group representative, where appointed.

Notes on article 13 [7bis]

21. Article 13 as drafted was approved at the fifty-third session (A/CN.9/937, para. 62). The Working Group may wish to consider the suggestion contained in paragraph 3 of the introduction to this Note. It may also wish to consider whether there is a need to add a reference to other insolvency representatives that might also have been appointed in the enacting State with respect to different group members (as noted above in para.16 (b)). Paragraph 1 might be drafted along the following lines:

“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 foreign courts, insolvency representatives of other enterprise group members and a group representative, where appointed.”

Article 14 [8]. Cooperation to the maximum extent possible under articles 12 and 13

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

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

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

(c) Allocation of responsibilities between a[n insolvency representative appointed in this State] [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*], a foreign representative and a group representative, where 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.

Notes on article 14

22. The Working Group may wish to consider whether, for greater clarity, the word “insolvency” might be added before the word “proceedings” in subparagraph (b). With respect to a possible further revision of subparagraph (b), see the note below under article 15.

23. Subparagraph (c), bearing in mind the discussion concerning articles 12 and 13 above, and the suggestion raised in paragraph 3 of the introduction to this Note, might be revised to ensure that all necessary parties are referred to in the context of allocating responsibilities. For that reason, subparagraph (c) might be revised along the following lines:

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

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

A[n insolvency representative] [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] and a group representative, where appointed, may enter into an agreement concerning the coordination of [insolvency] proceedings involving two or more enterprise group members located in different States, including where a group insolvency solution is being developed.

Notes on article 15 [9]

24. Article 15 has been revised in accordance with the report of the fifty-third session ([A/CN.9/937](#), para. 63), to add a reference to “a group representative, if appointed”. For greater clarity, the word “insolvency” might be added before the word “proceedings” in the heading and the text of the article, as indicated in square brackets, and the suggestion noted in paragraph 3 of the introduction to this Note might be adopted.

25. The Working Group may also wish to consider the relationship between article 15 and articles 9(f) and 14(b). Article 9(f) provides, in the context of court cooperation and coordination, that the court may approve and implement a coordination agreement; article 14(b) provides, in the context of cooperation and coordination between an insolvency representative, the court and other parties, for the negotiation of such agreements. Article 15 then authorizes an insolvency representative and other parties to enter into such an agreement. The Working Group may wish to consider whether these disparate provisions might be consolidated into a single provision addressing the various aspects of coordination agreements, or whether a cross-reference to article 14(b) in article 15 might be helpful. The guide to enactment could then explain the relationship between the 3 provisions, dealing with negotiation, authority to conclude, and approval and implementation.

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

The court may coordinate with foreign 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 in different States.

Notes on article 16 [10]

26. Article 16 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 65) and paragraph 2 has been deleted. The content of that paragraph is reflected in the guide to enactment in the notes on article 16.

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

1. Subject to paragraph 2, if a[n insolvency] proceeding [under [*identify laws of the enacting State relating to insolvency*]] has commenced [in this State] with respect to an enterprise group member whose centre of main interests is located 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 whose centre of main interests is located in another State may participate in a[n 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 a[n 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 a[n 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 [referred to in paragraph 1] 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.

Notes on article 17 [11]

27. Article 17 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, paras. 66–67): the previous reference in paragraph 1 to chapter 2 has been deleted. What was previously paragraph 4 has been moved to

follow paragraph 2. The text of what was paragraph 3bis has been revised and added to the beginning of paragraph 4.

28. If the formulation “insolvency proceedings” is preferred by the Working Group, as suggested above in paragraph 3 of the introduction to this Note, the draft article might be revised as indicated by the words in square brackets. The second sentence of paragraph 4 could be revised to read “participating in such a proceeding”, so that the reference to paragraph 1 did not need to be repeated.

Chapter 3. Conduct of a planning proceeding in this State

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

1. When one or more enterprise group members participate in a[n insolvency] proceeding referred to in article 17, and the requirements of article 2, subparagraphs (g)(i) and (ii) are met, the court may appoint a group representative, by which the proceeding becomes a planning proceeding.

2. A group representative is authorized to seek relief pursuant to article 19 in this State to support the development and implementation of a group insolvency solution.

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

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of the 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.

Notes on article 18 [12]

29. Article 18 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, paras. 68–69), deleting the word “otherwise” from paragraph 1 and adding in paragraph 2 a cross-reference to relief under article 19. The guide to enactment in the notes on article 18 explains that the reference to “foreign proceeding” in subparagraph (b) covers insolvency and other types of proceeding affecting the group member. As noted above with respect to article 17, paragraph 1 could be revised to read “participate in an insolvency proceeding referred to in article 17”. The words “in this State” might be added to the title of the article to reflect the chapter heading.

30. At the fifty-third session, the suggestion in paragraph 47 of document A/CN.9/WG.V/WP.158 to move what is now paragraph 3 of draft article 26 to draft article 18 was supported (A/CN.9/937, para. 69). The complexity of the discussion on draft article 26 led to that issue not being further considered (see paras. 85–91 of A/CN.9/937). The Working Group may wish to consider whether the suggestion concerning the location of article 26, paragraph 3, should be further considered.

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

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect the 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 of the following relief:

(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 and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

(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 a participating enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] 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 insolvency proceedings, 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 or operations located in this State of an enterprise group member that has its centre of 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.

Notes on article 19 [13]

31. Article 19 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, paras. 70–77). Subparagraph 1(c) has been placed with subparagraph 1(g) on the basis that they both relate only to participating group members; the chapeau refers to group members both “subject to or participating in” a planning proceeding. The title of the article might be revised to include the words “taking place in this State” to provide greater clarity.

32. The language of subparagraph 1(g) has been revised and the reference to the location of the funding entity deleted (this change has also been made in the corresponding subparas. of arts. 21 and 23). The proviso at the end of subparagraph 1(g) relating to safeguards has been deleted (A/CN.9/937, para. 79) to align it with the equivalent provisions in articles 21 and 23 (on the basis that it is covered by art. 25).

33. The Working Group may wish to consider the limitation in subparagraph 1(g) to participating group members. While this subparagraph mirrors article 21, subparagraph 1(g) and article 23, subparagraph 1(h) in the context of recognition of a planning proceeding, it may be appropriate to extend the provision in article 19 (which applies in the context of a domestic proceeding) to also include funding of group members *subject* to the planning proceeding. This may be of particular importance where the law of the enacting State in which the planning proceeding is taking place makes no provision for approval and authorization of such funding. In such a case, it may seem unusual to provide for approval and authorization of funding for group members participating in the planning proceeding, but not those subject to the planning proceeding.

34. The wording of the proviso at the end of paragraph 2 has been revised (this change is also reflected in arts. 21 and 23). The Working Group may wish to consider the wording of the proviso and whether the formulation “unless no insolvency proceeding was commenced in order to minimize the commencement of insolvency proceedings in accordance with this Law” is more felicitous.

Issue relating to the chapeaux of articles 19 and 23

35. Both articles 19 and 23 provide that the court “may grant any of the following relief”. This is less flexible than the drafting of the equivalent article of MLCBI, article 21, which provides that the court may grant “any appropriate relief, including”. The Working Group may wish to consider whether articles 19 and 23 should follow the drafting of MLCBI and provide greater flexibility to the court to order the relief specified in the article, any other relief available under the law of the enacting State in accordance with subparagraph (h) and, potentially, any other relief appropriate to the circumstances of the case.

Chapter 4. Recognition of a foreign planning proceeding and relief

36. As a preliminary question, the Working Group may wish to consider whether a provision along the lines of the second sentence of article 17, paragraph 4, is also required in respect of a group representative. It may be recalled that article 10 of MLCBI provides limited jurisdiction with respect to a foreign representative based on that representative making applications (e.g. for recognition or to commence a local proceeding) under MLCBI.

Article 20 [14]. 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 its centre of main interests in the State where 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.

Notes on article 20 [14]

37. Article 20 has been revised in accordance with the report of the fifty-third session ([A/CN.9/937](#), para. 78). In subparagraph 2(c), the words “concerning the appointment ...

that is” have been moved to follow the word “evidence”. In subparagraph 3(b), the word “insolvency” has been added before the first reference to “proceedings” and the words “are known to the group representative” have been moved to ensure that they refer to the words “insolvency proceeding”.

Article 21 [15]. 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 the 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 and preserve 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 a participating enterprise group member and authorizing the provision of finance under those funding arrangements; and
- (h) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

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

3. Unless extended under article 23, 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 in the centre of main interests of an enterprise group member participating in the [foreign] planning proceeding.

Notes on article 21 [15]

38. Article 21 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 79). The words “of a planning proceeding” have been added to paragraph 1. Subparagraph 1(g) has been revised to align it with the first part of article 19, subparagraph 1(g), and the proviso with respect to appropriate safeguards has been deleted on the basis that it is adequately covered by article 25 (as noted also with respect to the same provision in arts. 19 and 23). The wording at the end of paragraph 4 has been aligned with the wording of article 19, paragraph 2 (see drafting suggestion in para. 34 above).

39. With respect to subparagraph 1(e), the guide to enactment explains that the words “Where an insolvency representative is not able to administer or realize ...” also covers the situation where no insolvency representative was appointed in the enacting State (e.g., because art. 28 or art. 30 applies). With respect to subparagraph (e), the Working Group may wish to consider the circumstances in which the locally appointed insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State and include an explanation of that issue in the draft guide to enactment (see para. 152). Otherwise, it may not be clear why a group representative should be permitted to do something that the locally appointed insolvency representative is not capable of doing. The same issue arises with respect to articles 23(1)(f) and 23(2).

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

1. A [foreign] planning proceeding shall be recognized if:
 - (a) The application meets the requirements of article 20, 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.

Notes on article 22 [16]

40. Article 22 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 80): the “Subject to” phase at the beginning of paragraph 1 has been deleted on the basis that the public policy exception applies to all articles of the model law and that its application does not need to be highlighted by restating it in other articles.

Article 23 [17]. 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 the 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 of the following relief:
 - (a) Extending any relief granted under article 21, 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 and preserve 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;
- (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 an enterprise group member participating in the planning proceeding and authorizing the provision of finance under those funding arrangements; and
- (i) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, 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 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.

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 in the centre of main interests of an enterprise group member participating in the [foreign] planning proceeding.

Notes on article 23 [17]

41. Article 23 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, paras. 79, 81–82). Subparagraph 1(h) and paragraph 3 have been revised to align them with the equivalent subparagraphs of articles 19 and 21 (see drafting suggestion in para. 34 above). Paragraph 2 has been revised to correct the language.

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

1. Upon recognition of a [foreign] planning proceeding, the group representative may participate in any [insolvency] proceeding [commenced in this State] [under *[identify laws of the enacting State relating to insolvency]*] concerning enterprise group members that are participating in the [foreign] planning proceeding.
2. The court may approve participation by a group representative in any insolvency proceedings in this State concerning enterprise group members that are not participating in the [foreign] planning proceeding.

Notes on article 24 [18]

42. Article 24 has been revised in accordance with the report of the fifty-third session ([A/CN.9/937](#), para. 83) to add a new paragraph 2. The Working Group may wish to consider whether the qualification “Upon recognition of a planning proceeding” should also apply to paragraph 2 to limit the possibility of participation by a group representative. While such a qualification is required in the analogous article of MLCBI (art. 12), that article does not require court approval, but rather establishes an entitlement to participate. Since paragraph 2 provides the possibility of court approval, the requirement for recognition of the planning proceeding may not be required.

43. The draft article has been revised to include the amendments suggested above in the Introduction, paragraph 3.

Article 25 [19]. 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 participating enterprise group member 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.

Notes on article 25 [19]

44. Article 25 has been revised in accordance with the report of the fifty-third session ([A/CN.9/937](#), para. 84) and words have been added to paragraph 1 to clarify that it is the interests of the creditors of each “participating” group member that are to be protected.

45. Since articles 21 and 23 both refer to relief that may be granted with respect to group members that are both subject to insolvency proceedings and participating in a foreign planning proceeding, the Working Group may wish to consider whether the limitation of article 25 to the creditors of *participating* group members is sufficient in terms of the protections that article 25 is intended to afford to creditors. The reference to “other interested persons, including the enterprise group member subject to the relief to be granted” should be sufficiently broad to cover other parties that may be affected by any relief ordered.

46. Article 25 appears in a chapter focusing on recognition of a foreign planning proceeding, although it refers broadly to relief “under this Law”. The Working Group may wish to consider whether, as currently drafted and placed in the Model Law, it applies to the Model Law more broadly to include, for example, relief granted under chapter 3 in the context of supporting a foreign planning proceeding. If so, that application might need to be confirmed in some way, for example in the guide to enactment or by relocating the article within the model law.

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

1. Where a group insolvency solution affects an enterprise group member that has its centre of main interests or an establishment in this State and is participating in the [foreign] planning proceeding, the portion of the group solution affecting that enterprise group member shall have effect in this State once it has received any approvals and confirmations required in accordance with the law of this State.
2. Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a group representative under other laws of this State.
3. 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.

Notes on article 26 [20]

47. Article 26 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, paras. 90–91). The title has been simplified. Paragraphs 1 through 4bis have been deleted and replaced with a new paragraph 1. It was suggested at the fifty-third session (A/CN.9/937, para. 90) that reference to approvals and confirmation in the wording of paragraph 1 should be placed in square brackets to enable enacting States to specify applicable local requirements. In that case, the ending of paragraph 1 might be revised along the following lines, including replacing the word “all” with “any”: “... shall have effect in this State if it has received [all] [any] approvals and confirmations required under [*identify the law of the enacting State addressing the relevant approvals and confirmations that might be required*].”

48. Paragraph 2 has been revised along the lines of article 7 of MLCBI. Given the general applicability of paragraph 2, the Working Group may wish to consider whether it should be relocated in chapter 1 of the draft model law or whether it should be drafted to apply specifically to approval of a group insolvency solution and remain in article 26. As noted above in respect to article 18, the Working Group may wish to reconsider the placement of paragraph 3 in the draft model law.

Chapter 5. Treatment of foreign claims

Article 27 [21]. 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.

Notes on article 27 [21]

49. Article 27 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 96) with the conjunction “and” in paragraph 1 being replaced with

“or”. The explanation contained in paragraph 96 of A/CN.9/937 has been included in the guide to enactment (see notes on art. 27).

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

If a foreign representative of an enterprise group member or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 27, a court in this State, may:

- (a) Approve the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State; and
- (b) Stay or decline to commence a non-main proceeding.

Part B. Supplemental provisions

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

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.

Notes on article 29 [22]

50. Article 29 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 98). The square brackets around the word “insolvency” before the word “proceeding” have been deleted. To address some infelicitous drafting in the middle of the first sentence, the words “and the court in this State may approve” have been moved to the end of that sentence and the words “that treatment” added.

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

If a foreign representative of an enterprise group member or a group representative from another State in which an insolvency proceeding is pending has given an undertaking under article 29, a court in this State may:

- (a) Approve the treatment in the foreign insolvency proceeding of the claims of creditors located in this State; and
- (b) Stay or decline to commence a main proceeding.

Notes on article 30 [22 bis]

51. Article 30 has been revised in accordance with the report of the fifty-third session (A/CN.9/937, para. 99), with the square brackets around the word “insolvency” in the chapeau before the word “proceeding” being removed.

Article 31 [23]. 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 27 or 29 has been given, the court, in addition to granting any relief described in article 23, 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 23 that is necessary for implementation of the group insolvency solution.

Notes on article 31 [23]

52. Article 31 was approved at the fifty-third session of the Working Group ([A/CN.9/937](#), paras. 100–101) with the deletion of the words “the planning” and retention of the word “that” in paragraph 1, as well as retention of both options previously in square brackets in paragraph 2.
