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Enterprise group insolvency: guide to enactment of the draft model law (as contained in A/CN.9/WG.V/WP.161)

Note by the Secretariat

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I. Introduction

1. The draft text set out below provides guidance on application and interpretation of the draft model law on enterprise group insolvency, which is set out in document A/CN.9/WG.V/WP.161. It follows the same format as the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and the Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ), and draws upon those Guides as applicable; several articles of the draft model law are the same as, or similar to, articles of the MLCBI and to a lesser extent, the MLIJ. The relevant explanations for those articles set out below are therefore based upon the explanations contained in the MLCBI or MLIJ Guides, as well as upon part three of the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.

2. It is intended that the text of the articles of the model law will be included in the final version of the guide to enactment once the drafting of those articles is finalized. This document should thus be read together with A/CN.9/WG.V/WP.161, which contains the latest draft of the articles.

II. DRAFT guide to enactment of the [Model Law on Enterprise Group Insolvency]

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The [UNCITRAL Model Law on Enterprise Group Insolvency], adopted in …, is designed to assist States to equip their laws with a legislative framework to address the cross-border insolvency of enterprise groups, complementing the UNCITRAL Model Law on Cross-Border Insolvency (the MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide, part three).

2. The framework includes provisions on:

(a) Coordination and cooperation between courts, insolvency representatives and a group representative (where appointed), with respect to multiple insolvency proceedings concerning members of an enterprise group;

(b) Development of an insolvency solution for an enterprise group, whether in whole or part, through a single insolvency proceeding commenced at the centre of main interests (COMI) of at least one group member;

(c) Voluntary participation of multiple group members in that single insolvency proceeding (a planning proceeding) for the purposes of coordinating a group insolvency solution for relevant group members;

(d) Appointment of a representative (a group representative) to coordinate the development of a group insolvency solution through a planning proceeding;

(e) Approval of post-commencement finance arrangements in the group context and authorization of the provision of funding under those arrangements, as required;

(f) Cross-border recognition of a planning proceeding to facilitate the development of the group insolvency solution; and

(g) Measures designed to minimize the commencement of non-main insolvency proceedings relating to group members participating in the planning proceeding, including measures to facilitate the treatment of claims of creditors of those group members, including foreign claims, in a main proceeding.

3. What distinguishes this Model Law from the MLCBI, which concerns itself with multiple proceedings concerning a single debtor, is the focus on multiple insolvency proceedings relating to multiple debtors that are members of the same enterprise group. The framework of measures provided by this text, although it draws upon and, in several respects, is similar to the measures available under the MLCBI, goes considerably further because of the specific needs of insolvency proceedings affecting multiple enterprise group members.

B. Origin of the Model Law — preparatory work and adoption

4. At its forty-third session (2010),[1] the Commission adopted part three of the UNCITRAL Legislative Guide on Insolvency Law, which deals with the treatment of enterprise groups in insolvency. That text provides a discussion of relevant issues relating to both the domestic and cross-border insolvency treatment of enterprise groups, including the advantages and disadvantages of different solutions, as well as a set of legislative recommendations.

5. At the same session, the Commission gave Working Group V (Insolvency Law) a mandate to provide guidance on the interpretation and application of selected concepts of the MLCBI relating to centre of main interests and possibly to develop a

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, paras. 228–233).

model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.[2] The first part of the mandate was completed through revision of the Guide to Enactment of the MLCBI, resulting in adoption of the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency in July 2013.[3]

6. At its forty-fourth session (December 2013), Working Group V agreed that it should continue its work on the cross-border insolvency of enterprise groups by developing a model law on a number of issues, some of which would extend the existing provisions of the MLCBI and the Legislative Guide, part three and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide).[4] That second part of the mandate was completed with the negotiation of the Model Law between April 2014 and May 2019, the Working Group devoting a part of 10 sessions (forty-fifth – fifty-fifth) to work on the project.

7. The final negotiations on the Model Law took place during the fifty-second session of UNCITRAL, held in Vienna from … to … 2019. UNCITRAL adopted the Model Law by consensus on … . In addition to the 60 States members of UNCITRAL, representatives of … observer States and .. international organizations participated in the deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution ../.. of …. (see annex), in which it expressed its appreciation for UNCITRAL completing and adopting the Model Law.

II. Purpose of the Guide to Enactment

8. The Guide to Enactment is designed to provide background and explanatory information on the Model Law. That information is primarily directed to executive branches of Governments and legislators preparing legislative revisions necessary to enact the Model Law, but may also provide useful insight to those charged with interpretation and application of the Model Law as enacted, such as judges, and other users of the text, such as practitioners and academics. That information might also assist States in considering which, if any, of the provisions might be adapted to address particular national circumstances.

9. The Guide was considered by Working Group V at its fifty-fourth (December 2018) and fifty-fifth (May 2019) sessions. It is based on the deliberations and decisions of the Working Group at those sessions and of the Commission at its fifty-second session, when the Model Law was adopted.

III. A model law as a vehicle for the harmonization of laws

10. A model law is a form of text recommended to States for incorporation into their national law through the enactment of legislation. Unlike an international convention, a model law does not require the enacting State to notify the United Nations or other States that may have also enacted the text. However, the General Assembly resolution endorsing the Model Law (see annex) invites States that have used the text to advise the Commission accordingly.

A. Fitting the Model Law into existing national law

11. The Model Law is designed to equip a State with modern provisions addressing various aspects of the conduct of insolvency proceedings concerning members of an

[2] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259(a)).
[3] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17, paras. 195–197).
[4] See A/CN.9/798, para. 16, and also A/CN.9/763, paras. 13–14.

enterprise group, affecting both domestic and cross-border aspects of those proceedings.

12. A model law is inherently flexible, enabling States to make various modifications to the text when enacting it as national law. Some modifications may be expected, in particular, when a model law text is closely related to national court and procedural systems.

13. That flexibility to introduce modifications enables the Model Law to be adapted to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see notes on article 7 below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency-related matters. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, States may wish to make as few changes as possible when incorporating the Model Law into their legal systems. That approach would not only assist in making national law as transparent and predictable as possible for foreign users. It would also contribute to fostering cooperation between insolvency proceedings as the laws of different States will be the same or very similar; to reducing the costs of proceedings because of greater efficiency in the conduct of cross-border proceedings affecting enterprise group members; and to improving consistency and fairness of treatment in those proceedings.

14. The Model Law is intended to operate as an integral part of the existing law of the enacting State. While it is drafted as a standalone text, States that have enacted or are considering enacting the MLCBI and this Model Law, might note that several general provisions of the MLCBI are repeated in this Model Law, namely articles 3, 5, 6, and 7, together with several definitions.

B. Use of terminology

15. The Model Law introduces several new terms, including “group representative”, “group insolvency solution” and “planning proceeding”. Other terms, such as “insolvency representative”, “insolvency proceeding”, “main” and “non-main” proceeding, “enterprise”, “enterprise group” and “control” are used in other UNCITRAL insolvency texts or, like “group representative” are based upon definitions included in those other texts.

“Insolvency proceeding”

16. The Model Law relies upon the definition provided in the glossary of the Legislative Guide (Introd., subpara. 12(u)), which is consistent with the definition of “foreign proceeding” in the MLCBI, that is: “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 a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation”.

17. It should be noted that in some jurisdictions the expression “insolvency proceeding” has a narrow technical meaning in that it may refer, for example, only to a collective proceeding involving a company or a similar legal person or only to a collective proceeding with respect to a natural person. In the Model Law, the term refers only to collective proceedings concerning enterprises as defined in article 2, subparagraph (a). A detailed explanation of the various elements of the definition is included in the Guide to Enactment and Interpretation of the MLCBI with respect to the definition of “foreign proceeding”, at paragraphs 69–80.

“State”

18. The words “this State” are used throughout the text to refer to the entity that enacts the text (i.e. the enacting State). The term should be understood as referring to

a State in the international sense and not, for example, to a territorial unit in a State with a federal system.

"Court"

19. Like the MLCBI, the Model Law envisages the functions referred to being performed by a judicial or other authority competent to control or supervise an insolvency proceeding. To simplify the text, the word "court" should be interpreted as including that other authority as designated under article 5.

"Subject to" or "participating in" insolvency proceedings

20. These words are used through the text to distinguish between an enterprise group member with respect to which an insolvency proceeding has commenced (i.e. the debtor "subject" to that proceeding) and an group member that is only participating in an insolvency proceeding, principally a planning proceeding. Participation is described in article 17. An enterprise group member could be both subject to an insolvency proceeding and participating in other insolvency proceedings, such as a planning proceeding, for the purposes of developing a group insolvency solution that could affect that group member. Those different proceedings might be taking place in different jurisdictions. As used in the text, a group member "subject to" a planning proceeding is the insolvency debtor in the main proceeding that became that planning proceeding under article 18, paragraph 1.

"Main" proceeding/centre of main interests

21. The Model Law defines this term by reference to the concept of centre of main interests or COMI, drawing upon the substance of the definition of "foreign main proceeding" contained in article 2, subparagraph (b) of the MLCBI. The Model Law does not define COMI, but relies upon the explanatory material contained in the Guide to Enactment and Interpretation of the MLCBI at paragraphs 144–147.

"Non-main" proceeding

22. The Model Law defines this term by adopting the definition of "foreign non-main proceeding" contained in article 2, subparagraph (c) of the MLCBI, which is based upon the notion of establishment. The definition of "establishment" in the Model Law follows the definition of that term in article 2, subparagraph (f) of the MLCBI.

IV. Main features of the Model Law

23. As indicated above, the Model Law is intended to provide a legislative framework to address the cross-border insolvency of an enterprise group. Part A is a set of core provisions, dealing with matters that are regarded as key to facilitating the conduct of enterprise group insolvencies, both domestically (chapter 3) and in a cross-border context (chapter 4). Part B includes several provisions that go further than the measures provided in the core provisions and are indicated as being optional. In other words, States may wish to consider whether to include those provisions when enacting the Model Law.

24. Part A, chapters 1 and 3 are intended to supplement domestic insolvency law and facilitate the conduct of insolvency proceedings affecting two or more group members in the enacting State. Chapter 2 provides a framework for cross-border cooperation and coordination with respect to multiple proceedings affecting group members; these provisions draw upon the MLCBI and the recommendations of the Legislative Guide, part three. Chapter 4 provides a framework for recognition of a foreign planning proceeding, the provision of relief to assist the development of an insolvency solution for the group, as well as approval of a group insolvency solution, again drawing upon the recognition regime provided by the MLCBI. Chapter 5 permits the claims of an enterprise group member located in one jurisdiction

(a non-main jurisdiction) to be treated in a main proceeding concerning another group member taking place in another jurisdiction in accordance with the law applicable to those claims, provided an undertaking to accord such treatment has been given in the main proceeding Where such an undertaking has been given, chapter 5 enables the court in the non-main jurisdiction to approve that treatment in the main proceeding and to stay or decline to commence a local non-main proceeding, provided the interests of creditors are adequately protected. The enacting State may be either the location of the main proceeding or of a non-main proceeding. More detail is provided in the notes to the specific articles.

25. Part B sets out optional provisions States may choose to enact. These provisions concern (a) the effect on the relief that may be ordered in a creditor's home State of the treatment of that creditor's claims in a foreign insolvency proceeding, and (b) court approval of a group insolvency solution, based on the adequate protection of creditors. These provisions go a step further than the core provisions contained in part A, enabling the court in the situation outlined above to stay or decline to commence a local main proceeding (i.e. where the group member whose claims are being treated in the foreign proceeding has its centre of main interests or COMI in the declining jurisdiction). They would also allow a court to approve 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.

26. The use of these 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 that, for example, the group member would be subject to insolvency proceedings in the jurisdiction of its COMI. As a consequence, any departure 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 outweighs any negative effect on creditors' expectations, in particular, and on legal certainty in general. Such a departure would appear to be justified in only limited circumstances, such as:

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

(b) Where the enterprise group in question was closely integrated and there was, therefore, an obvious benefit in treating group member claims in the planning proceeding in lieu of commencing main proceedings in another jurisdiction (i.e. proceedings that would be conducted at the group member's COMI); and

(c) Where the use of the provisions of part A (if available) could not achieve a similar result.

27. The Model Law preserves the possibility of excluding or limiting any action based on overriding public policy considerations (article 6), although it is expected that the public policy exception would be rarely used.

Documents referred to in this Guide

28. (a) "MLCBI": UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) "Guide to Enactment and Interpretation": Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, as revised and adopted by the Commission on 18 July 2013;

(c) "Practice Guide": UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(d) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including part three: treatment of enterprise groups in insolvency (2010) and part four: obligations of directors in the period approaching insolvency (2013);

(e) “Judicial Perspective”: UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (updated 2013); and

(f) “MLIJ”: UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).

V. Article-by-article remarks

Title

“Model Law”

29. If the enacting State decides to incorporate the provisions of the Model Law into an existing national statute, the title of the enacted provisions would have to be adjusted accordingly, and the word “Law”, which appears in various articles, would have to be replaced by the appropriate phrase.

Part A. Core Provisions

Chapter 1. General provisions

Preamble

30. The goal of the Preamble is to provide a succinct statement of the basic policy objectives of the Model Law of facilitating cooperation and coordination between insolvency proceedings affecting different members of an enterprise group in order to achieve an insolvency solution that might apply to the whole or part of that enterprise group. This goal is in contrast (but complementary) to that of the MLCBI, which focuses on multiple proceedings for a single debtor.

31. While it is not customary in all States to include in legislation an introductory policy statement along the lines of the preamble, consideration might nevertheless be given to including such a statement of objectives either in the body of the statute or in a separate document, to provide a useful reference for interpretation of the law.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1 note [1]
A/CN.9/898, para. 109
A/CN.9/WG.V/WP.146, footnote 2
A/CN.9/903, para. 86
A/CN.9/931, para. 65
A/CN.9/WG.V/WP.158, II, para. 1
A/CN.9/937, paras. 51–52
A/CN.9/WG.V/WP.161, paras. 1–2

Article 1. Scope

32. The Model Law applies in the context of insolvency proceedings relating to enterprise groups. It addresses the conduct and administration of insolvency proceedings relating to two or more enterprise group members (i.e. multiple insolvency debtors), whether those proceedings are local proceedings commenced in the enacting State, foreign proceedings commenced in another State or proceedings commenced in both States. In the latter two instances, there is the potential for cross-border coordination and cooperation to be required. Where insolvency proceedings have commenced in different States for two or more members of an enterprise group, the text is intended to: (a) support cross-border cooperation and coordination with respect to those proceedings, and (b) establish new mechanisms that can be used to foster the development and implementation of an insolvency solution for the enterprise group as a whole or for a part or parts of the group (a group insolvency solution) through a single insolvency proceeding (a planning proceeding).

33. Paragraph 2 of article 1 contemplates that States may wish to indicate possible exceptions to application of the Model Law, reflecting a similar exception contained in article 1, paragraph 2 of the MLCBI. With a view to making the national insolvency law more transparent (for the benefit of foreign users of a law based on the Model Law), it is advisable that exclusions from the scope of the law be expressly mentioned by the enacting State in paragraph 2.

34. Like the MLCBI, proceedings concerning banks, insurance companies and other similar entities are mentioned as examples of proceedings that the enacting State might decide to exclude from the scope of the Model Law. Since it is not unusual for such entities to be part of an enterprise group, consideration might be given to the circumstances in which such entities should be excluded from the Model Law. The enacting State might wish, for example, to preserve the ability of an enterprise group member of the type that might be excluded under article 1, subparagraph 2 to participate in a planning proceeding in accordance with article 17, irrespective of whether it is itself subject to some form of specialized procedure (e.g. bank resolution). There may also be circumstances in which it is desirable to preserve the possibility of recognizing a planning proceeding based upon a proceeding commenced with respect to one of those types of entity where the insolvency of such an entity is subject to the insolvency law of the originating State.

35. In enacting paragraph 2, a State may also wish to make sure that it does not inadvertently and undesirably limit the ability of an insolvency or group representative or court to seek assistance under chapter 2 or recognition abroad with respect to a proceeding concerning such an enterprise group member. Even if the particular insolvency is governed by special regulation, it may be advisable, before generally excluding those cases from the Model Law, to consider whether it would be useful for certain features of the Model Law (e.g. chapter 2 on cooperation and coordination and possibly on certain types of discretionary relief) to be applicable in that case.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [2]
A/CN.9/898, para. 110
A/CN.9/WG.V/WP.146, footnote 3
A/CN.9/903, para. 87
A/CN.9/WG.V/WP.152, paras. 1–2
A/CN.9/931, para. 66
A/CN.9/WG.V/WP.158, II, para. 2
A/CN.9/937, para. 53
A/CN.9/WG.V/WP.161, para. 3

Article 2. Definitions

36. The definitions contained in article 2, subparagraphs (a) to (c) derive from the Legislative Guide, part three (Glossary, subparas. 4 (a), (b) and (c)). The definition of "enterprise group member" in subparagraph (d) is provided to circumscribe the limits of the use of that term throughout the text. The definition of an "enterprise" is not intended to refer to a division of a company in a particular region or State.

37. Other definitions are taken from, or are based upon, the MLCBI, namely "insolvency proceeding", "insolvency representative", "foreign representative", "main proceeding", "non-main proceeding" and "establishment". These have been included in the Model Law for the sake of completeness, as it is drafted as a standalone text. A State that has enacted the MLCBI and wishes to enact this Model Law may not need to repeat these definitions if this Model Law was to form part of the legislation enacting or supplementing enactment of the MLCBI.

38. The definition of "group representative" is based upon the definition of "foreign representative" in the MLCBI (article 2, subpara. (d)) and "insolvency representative" in the Legislative Guide (Introd., subpara. 12(v)). The functions the group

representative is authorized to undertake within the framework of the Model Law are described in the substantive articles (e.g., articles 18, 24 and 27). It might be noted that an insolvency representative appointed on commencement of a main proceeding that becomes a planning proceeding and the "group representative" appointed to that planning proceeding could be the same person (whether legal or natural), although there is no requirement to that effect.

39. "Group insolvency solution", is a new term, intended to be a flexible concept that may be achieved in different ways, depending on the circumstances of the specific enterprise group, its structure, business model, degree and type of integration between group members and other characteristics. Such a solution could include the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the enterprise group members or a combination of liquidation and reorganization proceedings for different group members. The solution should seek to include measures that would, or would be likely to, either maintain or add value to the enterprise group as a whole or at least to the enterprise group members involved.

40. A group insolvency solution is intended to be developed, coordinated and implemented through a planning proceeding, and it may or may not require insolvency proceedings to be commenced for all relevant group members. There may be other ways of dealing with creditor claims, depending on the availability of the mechanisms elaborated in articles 27 and 29, that can facilitate the treatment of foreign creditor claims in the planning proceeding in accordance with the law applicable to those claims.

41. "Planning proceeding" is also a new term. It is intended to refer to the insolvency proceeding through which a group insolvency solution could be developed and implemented. It must be a "main" proceeding commenced with respect to an enterprise group member, a "main proceeding" being one that falls within the meaning of that term as it is used in the MLCBI, i.e. a proceeding taking place in the State where the debtor has its COMI. The meaning and interpretation of COMI is discussed in detail in the Guide to Enactment and Interpretation of the MLCBI; article 16, paragraph 3, of the MLCBI provides that, in the absence of proof to the contrary, the debtor's registered office (in the case of an incorporated entity) is presumed to be its COMI (see GEI, paras. 137-149 and the Judicial Perspective on the MLCBI, paras. 93–135). It is not intended that there could be only one planning proceeding in an insolvency concerning an enterprise group. In some circumstances, such as where the group is horizontally organized in relatively independent units or where different plans are required for different parts of the group, more than one planning proceeding could be envisaged.

42. The enterprise group member with respect to which the main proceeding commences must be one that is a necessary and integral part of the resolution of the group's (or a part of the group's) financial difficulties. In other words, it should be apparent that the group insolvency solution in question could not be developed and implemented without the involvement of that particular group member. The main proceeding commenced with respect to that group member can become a planning proceeding and that group member is described in the text as being "subject to" the planning proceeding. A main proceeding commenced with respect to a group member that would be peripheral to the development of a group insolvency solution cannot become a planning proceeding, although that group member could participate in the planning proceeding. No criteria are provided for determining whether a group member is a necessary and integral part of a group insolvency solution, as it will depend on several different factors. Those relate to the structure of the enterprise group, the degree of integration between members, the insolvency solution that is to be proposed, the members that will need to be included in that solution and so forth.

43. To facilitate the development and implementation of a group insolvency solution, the text provides for relevant group members to "participate" in the planning proceeding (article 17). Those group members may also have their COMI or an establishment in the State in which the planning proceeding is taking place or in

another State. In either case, article 17 makes it clear that participation is voluntary and that a group member may commence or opt out of participation at any time. It also establishes the legal effect of such participation. In terms of participation in a planning proceeding, the Model Law simply refers to group members and makes no reference to, for example, whether a group member is solvent or insolvent or subject to insolvency proceedings. The central idea is that participation of all group members relevant to development of the group solution should be facilitated, irrespective of their financial status.

44. However, the text makes it clear that relief in support of a planning proceeding (art.19, para. 2) or of recognition of a foreign planning proceeding (art. 21, para. 4 and art. 23, para. 3) may not be granted with respect to the assets and operations of a group member for which no insolvency proceeding has commenced, unless the reason for not commencing relates to the goal of minimizing commencement of proceedings under the Model Law. The rationale of such a goal would be to avoid the costs and complexity associated with managing and coordinating multiple concurrent proceedings, when other mechanisms to simplify insolvency proceedings relating to the group might be available. These might include the availability of measures such as an undertaking of the type contemplated in article 27. Thus, in the circumstances covered by the exception, relief might be available with respect to the assets and operations located in the enacting State of the group member for which no insolvency proceeding has commenced. That said, nothing in the Model Law is intended to preclude a group member from voluntarily participating in or contributing to a planning proceeding.

45. The final element of a planning proceeding is that a group representative has been appointed. As noted above, that representative might be the same person as the insolvency representative appointed in the relevant main proceeding, or it may be a different person (art. 18, addressing appointment of the same or a single insolvency representative, may have some application in this context). In either case, the role to be played by the group representative with respect to the planning proceeding is set out in the text. The Model Law does not address the manner in which such a representative might be appointed, the qualifications required for appointment or the obligations applicable on appointment, leaving those issues to be determined in accordance with the applicable law of the State in which the relevant main proceeding commences. General considerations with respect to such appointments are discussed in the UNCITRAL Legislative Guide, part two, chapter III, paragraphs 174–187 and recommendations 115–125.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [3]–[7]
A/CN.9/898, paras. 111–114
A/CN.9/WG.V/WP.146, footnotes 4–7
A/CN.9/903, paras. 88–91
A/CN.9/WG.V/WP.152, paras. 3–4
A/CN.9/931, paras. 67–75
A/CN.9/WG.V/WP.158, II, paras. 3–5
A/CN.9/937, paras. 54–55
A/CN.9/WG.V/WP.161, paras. 4–5

Article 3. International obligations of this State

46. Article 3, expressing the principle of supremacy of international obligations of the enacting State over internal law, has been modelled on similar provisions in other model laws prepared by UNCITRAL, including the MLCBI.

47. In enacting the article, the legislator may wish to consider whether it would be desirable to take steps to avoid an unnecessarily broad interpretation of international treaties. For example, the article might result in giving precedence to international treaties that, while dealing with matters covered also by the Model Law (e.g. access to courts and

cooperation between courts or administrative authorities), were aimed at the resolution of problems other than those addressed by the Model Law. Some of those treaties, only because of their imprecise or broad formulation, may be misunderstood as dealing also with matters dealt with by the Model Law. Such a result would compromise the goal of achieving uniformity and facilitating cross-border cooperation in insolvency matters and would reduce certainty and predictability in the application of the Model Law. The enacting State might wish to provide that for article 3 to displace a provision of the national law, a sufficient link must exist between the international treaty concerned and the issue governed by the provision of the national law in question. Such a condition would avoid the inadvertent and excessive restriction of the effects of the legislation implementing the Model Law. However, such a provision should not go so far as to impose a condition that the treaty concerned has to deal specifically with insolvency matters in order to satisfy that condition.

48. In some States binding international treaties are self-executing. In other States, however, those treaties, with certain exceptions, are not self-executing as they require internal legislation in order to become enforceable law. In view of the normal practice of the latter group of States with respect to international treaties and agreements, it might be inappropriate or unnecessary to enact article 3 or it might be appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

A/CN.9/937, para. 58
A/CN.9/WG.V/WP.161, para. 6

Article 4. Jurisdiction of the enacting State

49. Article 4 is intended to clarify the scope of the Model Law by indicating that it is not seeking to interfere with the jurisdiction of the courts of the enacting State in the areas mentioned in subparagraphs (a) to (d).

Subparagraph (a)

50. Nothing in the Model Law is intended to limit the jurisdiction of the courts of the enacting State with respect to any group member over which it might have jurisdiction. So, for example, if a group member had an establishment in the enacting State and a non-main proceeding was required to address assets or business operations of the group member in the enacting State then, notwithstanding the commencement of a main proceeding with respect to that group member in another jurisdiction, the court of the enacting State could commence a non-main proceeding, as indicated in subparagraph (c).

Subparagraph (b)

51. This subparagraph is intended to preserve the jurisdiction of the courts of the enacting State with respect to the participation, in a group insolvency solution taking place in another State, of a group member subject to the jurisdiction of the enacting State. If the law of the enacting State precludes such a group member from participating in a proceeding, such as a planning proceeding, taking place in another State unless certain approvals are obtained, this subparagraph confirms that those requirements are not affected by the Model Law.

Subparagraph (c)

52. Subparagraph (c) recognizes, as a general principle that, in the group context, it might not always be necessary to commence an insolvency proceeding for every group member experiencing financial difficulty, but where such proceedings are required or requested, commencement should not be restricted. It does not address the status of those insolvency proceedings i.e. main or non-main, or the place in which such proceedings might be commenced.

53. It might be noted that non-main insolvency proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a single unit, or differences in the potentially multiple legal systems concerned are so great that difficulties may arise if the effects deriving from the law of the State of the commencement of proceedings were to be extended to other States in which assets are located. For that reason, the insolvency representative in the main insolvency proceeding may request the commencement of non-main insolvency proceedings when and where the efficient administration of the insolvency estate so requires. However, non-main insolvency proceedings may also hamper the efficient administration of an insolvency estate, especially in the group context, where numerous non-main proceedings might be commenced for different group members. There may thus be situations in which the court seized of a request to commence a non-main insolvency proceeding might be able, at the request of the insolvency representative in the main insolvency proceeding, to postpone or refuse to commence a non-main proceeding in order to preserve the efficiency of the main proceeding. Such a postponement or refusal might be subject to the condition that the interests of creditors of the relevant group member and other stakeholders are protected (see for example, articles 25 and 29).

Subparagraph (d)

54. This subparagraph complements the other subparagraphs of article 4 by confirming that, while it is not the intention of the article to limit the jurisdiction of the enacting State, it is also not the intention of the article to create an obligation to commence an insolvency proceeding where that obligation does not otherwise exist.

Discussion in UNCITRAL and the Working Group

A/CN.9/864, para. 14
A/CN.9/WG.V/WP.137/Add.1, principles 1 and 1bis
A/CN.9/870, para. 13
A/CN.9/WG.V/WP.142/Add.1, note [2], para. 5
A/CN.9/898, para. 110
A/CN.9/WG.V/WP.146, footnote 9
A/CN.9/903, para. 92
A/CN.9/WG.V/WP.152, para. 5
A/CN.9/931, para. 76
A/CN.9/WG.V/WP.158, part II, paras. 6–7
A/CN.9/937, para. 56
A/CN.9/WG.V/WP.161, paras. 7–9

Article 5. Competent court or authority

55. The competence for the judicial functions addressed in the Model Law may lie with different courts in the enacting State, which would wish to tailor the text of the article to its own system of court competence. The value of article 5, as enacted in a given State, would be to increase the transparency and ease of use of the legislation for the benefit, in particular, of foreign insolvency and group representatives and foreign courts. If, in the enacting State, any of the functions mentioned in article 5 are performed by an authority other than a court, the State would insert in that article, and in other appropriate places in the enacting legislation, the name of the competent authority.

56. In defining jurisdiction in matters mentioned in article 5, it is desirable that the implementing legislation not unnecessarily limit the jurisdiction of other courts in the enacting State, to entertain, in particular, requests for provisional relief by a foreign insolvency or group representative.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.146, footnote 11
A/CN.9/903, para. 93
A/CN.9/931, para. 78
A/CN.9/937, para. 57
A/CN.9/WG.V/WP.161, para. 10

Article 6. Public policy exception

57. Article 6 of the Model Law is an overarching provision that applies to all matters covered by the Model Law. Such a provision is included in other UNCITRAL Model Laws, including the MLCBI and the MLIJ. The notion of public policy is grounded in national law and may differ from State to State. No uniform definition of that notion is attempted in article 6.

58. In some States the expression "public policy" may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular, constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do so would contravene those fundamental principles.

59. The purpose of the expression "manifestly", which is also used in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

60. Judicial cooperation among insolvency courts, including through the recognition of a planning proceeding, should not be unduly hampered by an expansive interpretation of public policy.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.146, footnote 10
A/CN.9/903, para. 93
A/CN.9/931, para. 77
A/CN.9/937, para. 57
A/CN.9/WG.V/WP.161, para. 11

Article 7. Interpretation

61. A provision similar to the one contained in article 7 appears in a number of private law treaties (e.g. art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods). More recently, it has been recognized that such a provision would also be useful in a non-treaty text, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 7 has been modelled on article 8 of the MLCBI and article 8 of the MLIJ.

62. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL (For further information about the system, see para. 216 below.)

Discussion in UNCITRAL and the Working Group

A/CN.9/937, para. 58
A/CN.9/WG.V/WP.161, para. 12

Chapter 2. Cooperation and coordination

63. As noted above (para. 30), the provisions of the MLCBI focus a single debtor, albeit with assets in different States. For that reason, the MLCBI has limited application to enterprise groups with multiple debtors in different States, where the link between multiple proceedings is not a common debtor, but rather the fact that the debtors are all members of the same enterprise group. Unless the existence (and possibly the extent) of that group is or can be recognized under national law, proceedings concerning group members may appear to be unrelated to each other. Moreover, cross-border cooperation may appear to be unwarranted on the basis that it could interfere with the independence of local courts or be deemed unnecessary because each proceeding is, essentially, a national proceeding. While it may be possible in some instances to treat each group member entirely separately, for many enterprise groups resolution of the financial difficulty of a number of members may be achieved through a more widely-based, potentially group-wide, insolvency solution that reflects the manner in which the group conducted its business before the onset of insolvency and addresses the future of the group as a whole or in part. Such an approach may be of particular importance where the business of the group is conducted in a closely integrated manner.

64. For those reasons, it may be desirable that an insolvency law recognizes the existence of enterprise groups and the need, with respect to cross-border cooperation, for courts to cooperate with other courts, with insolvency representatives of different groups members and with group representatives. Such cooperation would be important not only with respect to insolvency proceedings concerning the same group member debtor, but also with respect to insolvency proceedings concerning different enterprise group members, especially those that may be taking part in developing an insolvency solution for the group as a whole or in part.

65. The articles in chapter 2 of the Model Law should be considered core articles that are intended to apply not only to the conduct of cross-border insolvency proceedings involving different group members, where cooperation and coordination are considered to be useful, but also to cases in which a group insolvency solution is being developed through a planning proceeding (as addressed in chapter 3).

66. Chapter 2 draws upon the MLCBI and its Guide to Enactment and Interpretation (chap. IV, paras. 209–223), the recommendations and commentary of the Legislative Guide, part three (chap. III, paras. 14–54 and recs. 239–254) and the Practice Guide (chap. II). As such, those texts serve as background information and should be read in conjunction with articles 8–17 of the Model Law. International guidelines that have been developed to assist the conduct of cross-border cooperation and coordination in insolvency cases might also be noted.[5]

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

67. Article 8, paragraph 1 authorizes the court to cooperate to the maximum extent possible with foreign courts, foreign insolvency representatives and, where appointed in the context of a planning proceeding, a group representative. Paragraph 2 provides authorization for direct communication between those parties to avoid the use of traditional, time-consuming procedures, such as letters rogatory or diplomatic channels. This ability may be critical where a court considers it should act with urgency to avoid potential conflicts, to preserve value or to address issues considered to be time-sensitive.

68. The focus of article 8 is the matters referred to in article 1 concerning insolvency proceedings commenced for one or more members of an enterprise group i.e. conduct

[5] One example is the guidelines developed by the Judicial Insolvency Network (the JIN Guidelines), which address numerous issues relevant in the context of chapter 2. The Guidelines can be found at https://www.supremecourt.gov.sg by searching for Judicial Insolvency Network.

and administration of those proceedings, as well as cross-border cooperation. Coordination and cooperation in that context might involve several different courts and insolvency representatives appointed in proceedings concerning different enterprise group members, in addition to a group representative where there is a planning proceeding. For that reason, it might require a somewhat different view to be taken to the one that might be appropriate in the case of concurrent insolvency proceedings affecting a single debtor; the ability and willingness of courts to take a global view of the business of the enterprise group and what is occurring in proceedings relating to different group members in different States might be key to the resolution of the group's overall financial difficulties. For the purposes of the Model Law, the term "concurrent insolvency proceedings" means proceedings taking place at the same time with respect to different group members, irrespective of whether they are in the same or different jurisdictions.

69. Additional material on coordination and cooperation can be found in the Legislative Guide, part three, chapter III, paras. 15–19 on general issues and recommendations 240, 242, and 243; and paragraph 20 on means of communication, as well as in the Practice Guide, chapter II, paragraphs 4–10.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [8]–[9]
A/CN.9/898, para. 62
A/CN.9/WG.V/WP.146, footnote 12
A/CN.9/903, para. 94
A/CN.9/931, para. 79
A/CN.9/WG.V/WP.158, section II, para. 8
A/CN.9/WG.V/WP.161, paras. 13–14

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

70. Article 9, which draws upon recommendation 241 of the Legislative Guide, part three, is suggested for use by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by article 8. As such it provides guidance on how cooperation "to the maximum extent possible" under article 8 might be interpreted and implemented. It is not intended to provide an exclusive or exhaustive list, as that approach might inadvertently preclude certain forms of appropriate cooperation. Such a list may be particularly helpful in States with a limited tradition of direct cross-border judicial cooperation, particularly in cases involving enterprise groups, and in States where judicial discretion has traditionally been limited.

71. Some of the elements of article 9 are discussed in detail in the Legislative Guide, part three, chapter III:

(a) Paragraph 20 — means of communication;

(b) Paragraphs 21–34 — establishing rules of procedures for court-to-court communication (including time and place of communication, notice of proposed communication, right to participate, recording of communication as part of the record of the proceeding, confidentiality, and costs of communication);

(c) Paragraphs 35–36 — coordination of the debtor's assets and affairs (see also the Practice Guide, chap. II, para. 11); and

(d) Paragraph 37 — appointment of a court representative (see also the Practice Guide, chap. II, paras. 2–3).

72. The agreements referred to in subparagraph (f) are analysed and discussed extensively in the Practice Guide.

73. As an overarching consideration with respect to coordination, the advantages of group coordination should not be outweighed by the associated costs. For that reason, it may be appropriate to consider how the costs should be determined, e.g. in

accordance with the law of the State of the planning proceeding, and how they should be shared by relevant group members.

74. Cross-border insolvencies may give rise to disputes between group members concerning claims, whether arising within or outside the group. These disputes might be resolved through the use of alternative dispute resolution mechanisms, an approach that could be particularly helpful when the disputes are of a cross-border nature. Subparagraph (h) authorizes the use of mediation and arbitration in such cases, provided the appropriate arbitration agreements are in place for the relevant parties or the parties agree to use such arbitration mechanisms after the dispute arises.

75. The implementation of cooperation would be subject to any mandatory rules applicable in the enacting State. In the case of requests for information, for example, rules restricting the communication of information, such as for reasons of protection of privacy or confidentiality, would apply.

76. Subparagraph (k) of article 9 offers the enacting State the possibility of including additional forms of cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State (see arts. 28 and 30) or other forms of assistance not expressly mentioned that are available under the law of the enacting State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [10]–[11]
A/CN.9/898, paras. 63–64
A/CN.9/WG.V/WP.146, footnote 13
A/CN.9/903, para. 95
A/CN.9/WG.V/WP.152, para. 6
A/CN.9/931, para. 80
A/CN.9/WG.V/WP.161, para. 15

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

77. Article 10 is based upon recommendation 244 of the Legislative Guide, part three. Where a court communicates with a foreign court in the context of cross-border insolvency proceedings, paragraph 1 makes it clear that the court retains its independent jurisdiction; the mere fact that communication has taken place does not imply a substantive effect on the authority or powers of the court, the matters before it, its orders or the rights and claims of parties participating in the communication. Such a proviso reassures the parties that the communication between the authorities involved in the insolvency proceedings will not jeopardize their rights or affect the authority and independence of the court before which they are appearing. It is also likely to reduce the likelihood of objections to planned communication and furnish the courts and their representatives with greater flexibility in managing their cooperation with each other. Further, it may ensure that courts and their representatives do not operate beyond the limits of their authority in engaging in communication with their counterparts in different jurisdictions. Notwithstanding such a proviso, it should be possible for the courts to explicitly reach agreement on a range of matters, including approval of a cross-border insolvency agreement.

78. For the avoidance of doubt, paragraph 2 elaborates on the effect of communication under article 8, with some specific examples of what should not be implied from a court's participation in such communication.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [12]–[13]
A/CN.9/898, para. 65
A/CN.9/WG.V/WP.146, footnote 14
A/CN.9/903, para. 96
A/CN.9/WG.V/WP.152, para. 7

A/CN.9/931, para. 81
A/CN.9/937, paras. 60–61

Article 11. Coordination of hearings

79. Article 11 is based upon recommendation 245 of the Legislative Guide, part three. See also the Practice Guide, chapter III, paras. 154–159.

80. Hearings that might variously be described as joint, simultaneous or coordinated ("coordinated hearings") can significantly promote the efficiency of concurrent insolvency proceedings involving enterprise group members by bringing relevant parties in interest together at the same time to share information and discuss and resolve outstanding issues or potential conflicts. This can help to avoid protracted negotiations and resulting time delays. What needs to be emphasized with respect to such hearings, however, is that each court should reach its own decision independently and without influence from any other court, as indicated in paragraph 3 of article 11. While such hearings may be relatively convenient to organize in a domestic setting to ensure coordination of proceedings with respect to different group members, they can be logistically very complicated to organize in an international setting, involving as they may different languages, time zones, laws, procedures and judicial traditions. They may result in a deadlock if, for example, the competencies of the authorities engaged in the hearing are not precisely agreed or established before the hearing.

81. Although they are potentially difficult to organize, such hearings have been used between some States that share a common language, legal tradition and similar time zones and have led to the successful resolution of difficult issues, in some instances in very large and complex insolvency proceedings, to the benefit of all parties concerned. Such hearings might be more widely used in the future, with appropriate procedures and safeguards to assist careful planning and avoid complications, as suggested by paragraph 2 of the article. The rules of procedure might address, for example, use of pre-hearing conferences; conduct of the hearings, including the language to be used and need for interpretation; requirements for the provision of notice; methods of communication to be used so that the courts can simultaneously hear each other; conditions applicable to the right to appear and be heard; documents that may be submitted; the courts to which participants may make submissions; the manner of submission of documents to the court and their availability to other courts; questions of confidentiality; limitations on the jurisdiction of each court with respect to the parties appearing before it;[6] and the rendering of decisions.

82. Some guidelines and agreements dealing with these types of hearings provide that in order to plan for orderly administration, the courts, their appointees or the insolvency representatives should communicate with their foreign counterparts in advance of the hearing to establish guidelines related to all procedural, administrative and preliminary matters.[7] Once a hearing has been concluded, the relevant authorities may further communicate to assess the content of the hearing, discuss next steps (including the need for additional hearings), develop or modify guidelines for future hearings, consider whether issuing joint orders would be feasible or warranted and determine how certain procedural issues that were raised in the hearing should be resolved.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [14]
A/CN.9/898, para. 66
A/CN.9/903, para. 97
A/CN.9/WG.V/WP.152, para. 8
A/CN.9/931, para. 82

[6] See for e.g., MLCBI, art. 10.
[7] See Annex A on Joint Hearings of the guidelines developed by the Judicial Insolvency Network (the JIN Guidelines), which can be found at https://www.supremecourt.gov.sg by searching for Judicial Insolvency Network.

A/CN.9/937, para. 59

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

83. Articles 12 and 13 address cooperation and coordination between the various office holders appointed in insolvency proceedings concerning enterprise group members in different jurisdictions and between those office holders and the relevant courts, whether in the enacting State or in another jurisdiction. They provide the necessary authorization for communication to take place between the insolvency proceedings of different group member debtors. These articles are based upon recommendations 246–249 of the Legislative Guide, part three. See also the Practice Guide chapter III, paras. 160–166.

84. Such office holders play a central role in the effective and efficient implementation of the insolvency law, with day-to-day responsibility for administration of the insolvency estates of the various debtors involved in an enterprise group insolvency. Thus, they will play a key role in ensuring the successful coordination of multiple proceedings concerning those group members by working with each other and with the courts concerned. In order to fulfil that role, they, like the courts, will need to have appropriate authorization to undertake the necessary tasks of, for example, sharing information, coordinating day-to-day administration and supervision of the debtors' affairs and negotiating cross-border insolvency agreements.

85. Such arrangements for cooperation and coordination cannot diminish or remove the obligations insolvency representatives (including a group representative) will have under the law governing their appointment, including professional rules and ethical guidelines.[8]

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [15]
A/CN.9/898, para. 68
A/CN.9/WG.V/WP.146, footnote 15
A/CN.9/903, para. 98
A/CN.9/WG.V/WP.152, para. 9
A/CN.9/931, para. 83
A/CN.9/WG.V/WP.158, part II, para. 9(a)
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, paras. 16–20

Article 13. 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 representatives and a group representative

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [15]
A/CN.9/898, para. 68
A/CN.9/WG.V/WP.146, footnote 16
A/CN.9/903, para. 99
A/CN.9/WG.V/WP.152, para. 9
A/CN.9/931, para. 84
A/CN.9/WG.V/WP.158, part II, para. 9(a)
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, para. 21

[8] See footnote 5: Judicial Insolvency Network Guidelines (JIN Guidelines), para. 4(ii).

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

86. Article 14 is based on recommendation 250 of the Legislative Guide, part three and is suggested for use by the enacting State to provide an indicative list of the types of cooperation that are authorized by articles 12 and 13. As such, it provides guidance on how "cooperation to the maximum extent possible" under those articles might be interpreted and implemented. It is not intended to provide an exclusive or exhaustive list, as that approach might inadvertently preclude certain forms of appropriate cooperation. Such a list may be particularly helpful in States with a limited tradition of direct cross-border cooperation, particularly in cases involving enterprise groups, and in States where discretion has traditionally been limited.

87. The information-sharing referred to in subparagraph (a) may be key to facilitating coordination and cooperation and should be encouraged as far as possible (sharing of information between the parties and with third parties is discussed in some detail in the Practice Guide, chap. III, paras. 160–166). The proviso relating to confidential information should not be interpreted as providing a basis for declining to share information, but appropriate safeguards need to be put in place to ensure that information not in the public domain is protected as required, that third parties are not placed in a position where they can take unfair advantage of that information and that sensitive information relating to group members not subject to insolvency proceedings does not become widely available. Different methods of protection may be used, as described in the Practice Guide (chap. III, paras. 178–181). The agreements referred to in subparagraph (b) are extensively analysed and discussed in the Practice Guide.

88. Provisions in part three, chapter II of the Legislative Guide, such as those addressing procedural coordination (paras. 22–37 and recs 202–210), could be relevant in the context of coordination and cooperation between the group representative and insolvency representatives, where the insolvency representatives have been appointed in proceedings concerning other group members also located in the enacting State i.e. in what would be a domestic situation concerning cooperation and coordination between local proceedings.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [16]–[18]
A/CN.9/898, para. 69
A/CN.9/WG.V/WP.146, footnote 17
A/CN.9/903, para. 100
A/CN.9/931, para. 85
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, paras. 22–23

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

89. Article 15 is based upon recommendations 253–254 of part three of the Legislative Guide. The subject of such agreements is analysed and discussed in some detail in the Practice Guide. It recognizes the desirability, in order to enhance cross-border cooperation, of authorizing the relevant parties — insolvency representatives, a group representative and other parties in interest — to conclude cross-border insolvency agreements concerning different group members in different States and permitting the courts to approve or implement them, taking into consideration the group context. It should be noted that different States may have different form requirements that will have to be observed in order for the agreements to be effective.

90. The insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate the administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border insolvency agreements. Those

agreements are designed to address issues arising in cross-border cases, facilitating their resolution through cooperation among the courts, the debtor and other parties in interest across jurisdictional lines, to work efficiently and to increase realizations for creditors in potentially competing jurisdictions. Their use can effectively reduce the cost of litigation and enable parties to focus on the conduct of the insolvency proceedings, rather than upon resolving conflict-of-laws and other such disputes. Moreover, in addition to clarifying parties' expectations, such agreements can assist in the preservation of the debtor's assets and the maximization of value. In the practice to date, such agreements have typically been approved by the courts, but they might also be approved by creditors or creditor committees or operate as contractual arrangements between the signatories.

91. Cross-border insolvency agreements are generally entered into for the purpose of facilitating international cooperation and the coordination of multiple insolvency proceedings in different States. Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonization of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may also be addressed). They vary in form (written versus oral) and scope (generic to specific) and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings.

92. Those agreements can be regarded as contracts between the signatories or, in case of approval by the court, may obtain the legal status of a court order. Agreements may cover one or more matters, and nothing prevents parties from concluding several agreements as proceedings progress to address different issues that arise. It is not uncommon, for example, to have agreements addressing general communication and cooperation at the start of insolvency proceedings, followed later by specific agreements on claims procedures. The conclusion of a cross-border insolvency agreement is thus not limited to a certain time period, such as before the commencement of proceedings. While it is certainly preferable at an early stage of the proceedings in order to address expectations and provide clarity, an agreement may be concluded at a later stage, when particular issues arise that indicate a need for cooperation. Existing agreements may also be modified, subject to any requirements of the agreement regarding modification.

93. As noted above, cross-border insolvency agreements may include only general principles on how cooperation and coordination should be handled, or also address specific issues, depending upon the needs of the particular case and the issues to be resolved. Issues typically addressed include some or all of the following:

(a) Allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives and a group representative, including limitations on authority to act without the approval of the other courts or insolvency representatives;

(b) Availability and coordination of relief;

(c) Coordination of recovery of assets for the benefit of creditors generally, in case claims for assets of a group member subject to insolvency proceedings in a different State are raised;

(d) Submission and treatment of claims;

(e) Use and disposal of assets;

(f) Methods of communication, including language, frequency and means;

(g) Provision of notice;

(h) Coordination and harmonization of reorganization plans;

(i) Issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution;

(j) Administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions;

(k) Choice of applicable law with respect to overlapping issues;

(l) Allocation of responsibilities between the parties to the agreement;

(m) Costs and fees; and

(n) Safeguards.

94. The safeguards included typically relate to ensuring that nothing in the agreement derogates from the court's independence and authority, public policy and applicable law, particularly with respect to any obligations undertaken by the insolvency representative, a group representative or the parties, including the debtor.

95. Such agreements are increasingly common, especially in certain States, and have been successfully employed in different situations, such as concurrent reorganization and liquidation proceedings in different States; main and non-main proceedings as defined by the MLCBI; and concurrent insolvency and non-insolvency proceedings in different States. It should be noted, however, that while the insolvency law of certain States may permit courts to approve cross-border agreements regarding the same debtor (for example, through provisions analogous to article 27 of the MLCBI), that authorization may not necessarily extend to the use of such agreements in the group context. What might be required to facilitate the global resolution of a group's financial difficulties (be it global reorganization or a combination of different procedures) is an agreement to coordinate multiple proceedings with respect to different debtors in different States, albeit members of the same group. Since many laws may lack the provisions necessary to enable a court to approve or recognize an agreement relating not only to debtors subject to its jurisdiction, but also to debtors that are not, even if they are members of the same enterprise group, article 15 provides the relevant authorization.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [19]
A/CN.9/898, para. 70
A/CN.9/WG.V/WP.146, footnote 18
A/CN.9/903, para. 101
A/CN.9/WG.V/WP.152, para. 10
A/CN.9/931, para. 86
A/CN.9/WG.V/WP.158, part II, para. 9(b)
A/CN.9/937, para. 63
A/CN.9/WG.V/WP.161, paras. 24–25

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

96. Article 16 is based upon the discussion in the Legislative Guide, part three, on appointing a single or the same insolvency representative as a means of facilitating the conduct and coordination of multiple insolvency proceedings concerning enterprise groups members (see chap. II, paras. 142–144, chap. III, paras. 43–47 and recs 233 and 252). In practice, it might be possible to appoint one person to administer multiple proceedings or it might be necessary to appoint the same person to each of the proceedings to be coordinated, depending on the procedural requirements of the relevant States and the number of courts involved.

97. When the same or a single insolvency representative is to be appointed in different States in multiple insolvency proceedings affecting members of the same enterprise group, that person (whether natural or legal) would need to meet applicable local requirements in those appointing States. Where a person is appointed in the enacting State and in other States, the appointment in a foreign State could not

diminish their obligations under the law of an enacting State (see Legislative Guide, part three, chap. II, paras. 139–145 with respect to domestic proceedings). In the international context, such an appointment has the potential to greatly facilitate cooperation between the different proceedings and the reorganization of the group as a whole.

98. Although the administration of each of the relevant group members would remain separate, an appointment of a single or the same insolvency representative could help to ensure coordination of the administration of the various group members, reduce related costs and delays and facilitate the gathering of information on the group as a whole. With respect to the latter point, care might need to be exercised in how that information is treated, ensuring in particular that confidentiality requirements with respect to separate group members are observed.

99. In deciding whether it would be appropriate to appoint a single or the same insolvency representative, the nature of the group, including the level of integration of its members and its business structure, would need to be considered. In addition, it is highly desirable that any person to be appointed in that capacity have the appropriate experience and knowledge (see Legislative Guide, part two, chap. III, paras. 36–47, especially para. 39) of international insolvency matters and that that knowledge and experience be carefully scrutinized before the appointment is made to ensure that it is appropriate to the particular group members concerned and the business they conduct. It is also desirable that a single or the same insolvency representative be appointed to administer two or more group members only where it will be in the interests of the insolvency proceedings to do so.

100. The appointment could be of a natural person qualified to act in different States or a legal person, where that legal person employed or had as its members appropriately qualified persons who could serve as insolvency representatives in a number of different States. Although the availability of those qualified persons might generally be limited, there may be regions where such an appointment is more common or the globalization of trade and services makes it increasingly feasible.

101. It might also be noted that the Model Law contemplates that the insolvency representative might also be a debtor-in-possession.

Conflict of interest

102. Where a single or the same insolvency representative is appointed to administer several members of a group with complex financial and business relationships and different groups of creditors, there is the potential for loss of neutrality and independence. Conflicts of interest may arise, for example, if the same insolvency representative is appointed in situations involving cross-guarantees, intra-group claims and debts, post-commencement finance, lodging and verification of claims or wrongdoing by one group member with respect to another group member. The obligation to disclose potential or existing conflicts of interest (as reflected in the Legislative Guide, part two, recs 116 and 117, as well as part three, recs 233 and 252) would be relevant to the group context. As a safeguard against possible conflicts, the insolvency representative could be required to provide an undertaking or be subject to a practice rule or statutory obligation to seek direction from the court. Additionally, the insolvency law could provide for the appointment of one or more further insolvency representatives to administer the relevant group members in the event of a conflict of interest, a situation that would render article 16 inapplicable. Any additional appointment might relate to the specific area of conflict, with the appointment being limited to its resolution, or it might be a more general appointment for the duration of the proceedings.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [20]
A/CN.9/898, para. 71
A/CN.9/WG.V/WP.146, footnote 19

A/CN.9/903, para. 102
A/CN.9/931, para. 87
A/CN.9/WG.V/WP.158, II, para. 8
A/CN.9/937, paras. 64–65
A/CN.9/WG.V/WP.161, para. 26

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

103. Article 17, which applies generally to group-related insolvency proceedings, is intended to provide an additional tool for cooperation by facilitating the participation of group members (wherever located) in the main proceeding, as defined in article 2, subparagraph (k), commenced in the enacting State with respect to a group member having its COMI in that State. For that reason, and because the development of a group insolvency solution is only one possible result of participation, the article forms part of chapter 2, rather than chapter 3 of the Model Law. The bundle of rights that might constitute "participation" is indicated in paragraph 4 and includes the right to appear and to be heard in the main proceeding, to make written submissions to the court of the enacting State on matters affecting the interests of that group member and to take part in negotiations to develop and implement a group insolvency solution, in cases where that is relevant.

Paragraph 2

104. The qualification "subject to paragraph 2" at the beginning of paragraph 1 of article 17 is intended to mean that paragraph 2 contains the only limitation applicable to participation in an insolvency proceeding. Paragraph 2 permits a group member with its COMI in a State other than the enacting State to participate in the proceeding in the enacting State, unless the court in the other State prohibits it from so doing. This echoes the substance of article 4, subparagraphs (a) and (b), which emphasize that the Model Law does not interfere with the ability of the State with jurisdiction over a group member to limit such participation.

Paragraph 3

105. Paragraph 3 confirms that the participation referred to in paragraph 1 is entirely voluntary and that a group member may commence its participation or opt out of it at any time during the currency of the proceeding. Its ability to do so may be moderated by the impact of domestic law, particularly as it relates to company law, and …. [*to be completed with other examples*].

Paragraph 4

106. The second sentence of paragraph 4 is based upon article 10 of the MLCBI and constitutes a "safe conduct" rule aimed at ensuring that a court in the enacting State would not assume jurisdiction over a group member on the sole ground that the group member had standing to "participate" in the main proceeding. The article responds to concerns about exposure to all-embracing jurisdiction that might otherwise be triggered by such participation.

107. The limitation on jurisdiction over the group member embodied in article 17, paragraph 4 is not absolute. It is only intended to shield the group member to the extent necessary to make court access for the purposes of participation a meaningful proposition. Other possible grounds for jurisdiction over the group member under the laws of the enacting State are not affected. For example, a tort or misconduct committed by the group member or its authorized representative may provide grounds for jurisdiction to deal with the consequences of such an action.

108. The limitation in article 17, paragraph 4 may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person on the sole ground of the person's appearance in court. Enacting that provision in those

States could be useful, however, to eliminate potential concerns of group members over the possibility of jurisdiction being exercised on the sole ground of their participation in the main proceeding.

109. The participation referred to in article 17 is intended to apply to all group members, irrespective of their financial status. Accordingly, it makes no distinction between a group member that might be subject to insolvency proceedings and a group member that is not, avoiding any distinction based upon financial status, such as between what might be described as an "insolvent" or "solvent" group member. The focus of the article is the usefulness or desirability of a group member participating in such a main proceeding, whether because it has something to contribute to the resolution of the financial difficulty of the group member subject to that proceeding (e.g. it may own intellectual property that is key to the insolvency solution being developed for the group) or because it seeks to protect its own interests. Such participation by group members is, in fact, not unusual in practice as they can often aid the reorganization or liquidation of the enterprise group members subject to the insolvency proceedings (see Legislative Guide, part three, rec. 238). Where the group member seeking to participate is not subject to an insolvency proceeding and thus not restricted by the application of insolvency law, the decision to participate is likely to be an ordinary business decision of that member (subject to the application of art. 17, para. 2). The consent of creditors would not be necessary unless required by applicable law. Caution would need to be exercised in dealing with any information relating to that group member and its business affairs that may have been or may have to be disclosed in the course of participation in the main proceedings.

110. The articles addressing relief under the Model Law (article 19, paragraph 2; article 21, paragraph 4; and article 23, paragraph 3) confirm that relief may not be granted in the enacting State against the assets and operations of a participating group member for which no insolvency proceeding has commenced, unless the exception contained in those articles applies. That situation is discussed further in the commentary to article 19 (see in particular paras. 130–134).

Paragraph 5

111. Where a group member participates in a proceeding under article 17, paragraph 5 of the article provides that it should be kept informed of actions relating to the development of a group insolvency solution, where one is being developed. It does not indicate how that information should be provided or by whom, leaving those procedural issues to the applicable domestic law.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [21]–[22]
A/CN.9/898, paras. 72–74
A/CN.9/WG.V/WP.146, footnotes 20–25
A/CN.9/903, paras. 103–106
A/CN.9/WG.V/WP.152, para. 11
A/CN.9/931, paras. 88–90
A/CN.9/WG.V/WP.158, II, para. 10
A/CN.9/937, paras. 66–67
A/CN.9/WG.V/WP.161, paras. 27–28

Chapter 3. Conduct of a planning proceeding in this State

112. Chapter 3 of the Model Law addresses the conduct of a planning proceeding in the enacting State, focusing on appointment of a group representative and the provision of relief to support the development of a group insolvency solution in the planning proceeding. As such, the provisions are intended to supplement the law of the enacting State as it relates to the conduct and administration of insolvency proceedings.

113. Additional mechanisms, such as those discussed in the Legislative Guide, part three, chapter II that are designed to facilitate the insolvency treatment of enterprise groups in a domestic context might also be considered by enacting States. Those provisions address joint application for commencement, procedural coordination and, in limited circumstances, substantive consolidation (Legislative Guide, part three, recs. 199–210 and 219–231).

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

114. Article 18 indicates how a main proceeding commenced in the enacting State becomes a planning proceeding with the participation of one or more group members (i.e. in addition to the group member subject to the main proceeding), as well as the appointment, by the court, of a group representative. What constitutes participation is described in more detail in article 17, paragraph 4.

115. The group representative and the insolvency representative appointed to the main proceeding could be the same person, and in practice that is often the case, but there is no requirement to that effect in the Model Law. Where they are the same person, however, provision may need to be made to avoid potential conflicts of interest between the two appointments (see para. 102 above, and Legislative Guide, part three, chap. II, para. 144 and rec. 233, and chap. III, para. 47), as the obligations and responsibilities may overlap.

116. However, the tasks to be undertaken by the insolvency representative with respect to the main proceeding and by the group representative with respect to the planning proceeding might differ. The task of the group representative is representation of the planning proceeding and development of a group insolvency solution, rather than administration of the insolvency proceedings with respect to individual members, which is the focus of the insolvency representatives. That task will require the group representative to work with the insolvency representatives of the relevant group members, as indicated in the coordination and cooperation provisions of chapter 2.

Paragraph 2

117. Paragraph 2 specifies that the relief that might be sought by a group representative in the enacting State is the relief available under article 19 to distinguish it from the relief that would be available following recognition of a planning proceeding under chapter 4 of the Model Law.

Paragraph 3

118. Paragraph 3 of article 18 is intended to equip the group representative with the authorization required to act abroad as foreign representative of the planning proceeding. The absence of such authorization in some States can prove to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which a group representative might already be equipped to act as foreign representative of the planning proceeding may decide to forgo inclusion of this provision, although retaining it would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.

119. Clearly, however, the group representative's ability to act in the foreign State will depend upon what is permitted by the foreign law and courts. Accordingly, the paragraph is drafted in terms of authorizing the group representative "to seek" to do certain things. Action that the group representative appointed in the enacting State may wish to take in a foreign country will be action of the type dealt with in the Model Law. However, the authority to act in a foreign country does not depend on whether that country has also enacted legislation based on the Model Law.

120. The authorization provided in subparagraphs 3(b) and (c) concerns foreign proceedings relating both to group members participating in the planning proceeding and those group members not so participating. This is based on the possibility that

those foreign proceedings or elements of those proceedings might be relevant to the development and implementation of a group insolvency solution, whether because there is information to be obtained from or provided to those proceedings or for some other reason. The reference to "a foreign proceeding" in both of these subparagraphs is not limited to insolvency proceedings and could include other types of proceeding relating to the relevant group members.

121. In addition to the authorization provided by article 18, the group representative can participate, under article 24, in insolvency proceedings relating to group members in a State recognizing a planning proceeding. Under article 27, the group representative is authorized to give, jointly with an insolvency representative, an undertaking relating to the treatment of foreign claims.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [23]–[24]
A/CN.9/898, paras. 75–76
A/CN.9/WG.V/WP.146, footnotes 26–29
A/CN.9/903, paras. 107–109
A/CN.9/WG.V/WP.152, paras. 12–13
A/CN.9/931, paras. 91–92
A/CN.9/WG.V/WP.158, II, paras. 11–12
A/CN.9/937, paras. 68–69
A/CN.9/WG.V/WP.161, paras. 29–30

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

122. Article 19 details the types of relief that might be included in domestic law in order to support the development of a group insolvency solution. The types of relief specified are typical of, or frequently ordered in, insolvency proceedings; the list is not exhaustive and the court is not unnecessarily restricted in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case. Given the context in which relief might be sought, the article addresses group members that are both subject to and participating in a planning proceeding. In respect of the latter, the availability of the relief would be subject to certain limitations. These would include that (a) the group member had assets or operations in the State in which the planning proceeding is taking place, (b) those assets or operations could be subject to the relief sought, and (c) the relief to be granted did not interfere with the conduct and administration of any insolvency proceeding taking place at that group member's COMI in another State, as provided by paragraph 3. Under article 25, paragraph 2, the court may subject any relief granted under article 19 to any conditions it considers appropriate.

Paragraph 1

Subparagraphs (a) and (b)

123. Subparagraph (a) makes it clear that execution against the assets of the enterprise group member can be stayed, while subparagraph (b) provides for suspension of the transfer, encumbrance or other disposal of the group member's assets. The rationale of these provisions is to allow steps to be taken to ensure the planning proceeding can be conducted in a fair and orderly manner.

124. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under subparagraph (b). Those sanctions vary, depending on the legal system; they might include criminal sanctions, penalties and fines or the acts themselves might be void or capable of being set aside. From the viewpoint of creditors, the main purpose of those sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor. For that purpose, the setting aside of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

Subparagraph (c)

125. Subparagraph (c), by not distinguishing between various kinds of individual action, would also cover actions before an arbitral tribunal. Thus, article 19 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is additional to other possible limitations existing under national law that may restrict the freedom of the parties to agree to arbitration (e.g. limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 1958. However, bearing in mind the particularities of international arbitration, specifically its relative independence from the legal system of the State in which the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in the same State as the planning proceeding, it may be difficult to enforce the stay of the arbitral proceedings. Apart from that, the interests of the parties may be a reason for allowing an arbitral proceeding to continue, except where to do so would interfere with the administration of insolvency proceedings under paragraph 3.

126. Subparagraph (c) refers not only to "individual actions" but also to "individual proceedings" in order to cover, in addition to "actions" instituted by creditors in a court against the debtor or its assets, enforcement measures initiated by creditors outside the court system, being measures that creditors are allowed to take under certain conditions in some States. Subparagraph (a) makes it clear that execution against the assets of the debtor is covered by the stay.

Subparagraph (d) and (e)

127. Subparagraphs (d) and (e) reflect typical types of relief that are available in insolvency proceedings.

Subparagraph (f)

128. Subparagraph (f) relates specifically to group members participating in the planning proceeding and permits the court to stay any insolvency proceedings taking place in the enacting State concerning those group members. The rationale is that it may be essential to the negotiation of a group solution that that group member and its assets be preserved. This provision enables that to be achieved through application of a stay on insolvency proceedings. If the group member ceases to participate in the planning proceeding, perhaps because it is decided it does not need to be part of the group insolvency solution, the stay would cease to apply and any insolvency proceedings commenced could continue.

Subparagraph (g)

129. Part three of the Legislative Guide addresses post-commencement finance in the enterprise group context (chap. II, paras. 55–74 and recs. 211–216). The relief available under article 19 might include, as noted in subparagraph (g), approval of the arrangements for post-commencement finance granted to group members participating in the planning proceeding and authorization to continue those arrangements. In considering whether to accord such approval and authorization, the court might take into consideration various criteria, including whether the funding arrangement is necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of its estate, whether any harm to creditors of that group member will be offset by the benefit to be derived from continuing that funding arrangement (chap. II, rec. 212), whether the funding arrangement safeguards the development of a group insolvency solution and whether the interests of local creditors are protected, as required under article 25.

Paragraph 2

130. Paragraph 2 limits the relief available under article 19 to the assets and operations located in the enacting State of enterprise group members participating in the planning proceeding, where those group members are subject to insolvency proceedings at the time that relief is sought; relief may not be granted in respect of a participating group member if it is not subject to an insolvency proceeding, unless the exception contained in paragraph 2 applies. The group member may not be subject to an insolvency proceeding for various reasons. It may not be eligible under the applicable law of the relevant State (e.g. it does not satisfy the applicable insolvency tests), in which case no relief may be ordered. It may also not be subject to an insolvency proceeding because, as stated in paragraph 2, a decision has been taken to minimize the commencement of insolvency proceedings, for example non-main proceedings, in accordance with the Model Law (see for example arts. 27 and 28). In the latter case, relief may be granted.

131. Paragraph 2 describes group members by reference to whether they are subject to insolvency proceedings rather than by reference to their financial status i.e. solvent or insolvent, to avoid the difficulties and the differences associated with defining that status under national law and the fact that under some laws, insolvency is not a requirement for commencement of an insolvency proceeding. That approach of "subject to insolvency proceedings" is consistent with the usage in the Legislative Guide.

132. As noted above under article 17 (see para. 109), there may be circumstances in which different levels of participation in a planning proceeding by a group member not subject to an insolvency proceeding might be both appropriate and feasible, on a voluntary basis, including where no proceeding is commenced in accordance with the Model Law (for example, pursuant to art. 28). Such participation by those group members is not, in fact, unusual in practice. That group member could thus aid the group insolvency solution being developed for other enterprise group members.

133. The decision by such a group member to participate in a planning proceeding is likely to be an ordinary business decision of that member (subject to the application of art. 17, para. 2) and the consent of creditors would not be necessary, unless required by applicable law. As the explanation of article 1, paragraph 2 points out, it is increasingly the case that enterprise groups include members that might be subject to special insolvency regimes, such as banks, financial institutions, insurance companies and similar entities. It may be important to preserve the ability of such members to participate in a group insolvency solution. Where that member is subject to some form of specialized proceeding (e.g. a bank resolution proceeding), any decision to participate is likely to be made by the person administering that proceeding rather than by the member.

134. As noted above, caution would need to be exercised to protect information disclosed in the planning proceeding where it relates to the affairs of a group member not subject to an insolvency proceeding.

Paragraph 3

135. Article 19, paragraph 3, pursues the objective of coordinating relief between insolvency proceedings affecting group members, especially where a group insolvency solution is being developed. Relief might be sought under article 19 with respect to the assets and operations located in the enacting State of a group member with its COMI in another State, where that group member is participating in the planning proceeding and such relief might be required to support the development of a group insolvency solution. Relief granted under this article in the enacting State with respect to those assets and operations should not interfere with the administration of any insolvency proceedings concerning that group member that are taking place in the COMI State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [25]–[29]
A/CN.9/898, paras. 77–85
A/CN.9/WG.V/WP.146, footnotes 30–33
A/CN.9/903, paras. 110–112
A/CN.9/WG.V/WP.152, paras. 14–21
A/CN.9/931, para. 93
A/CN.9/WG.V/WP.158, II, paras. 13–22
A/CN.9/937, paras. 70–77
A/CN.9/WG.V/WP.161, paras. 31–35

Chapter 4. Recognition of a foreign planning proceeding and relief

136. Chapter 4 establishes a framework for cross-border recognition of a foreign planning proceeding. That framework draws upon elements of the similar framework provided by the MLCBI. The goal is to provide a simple, expeditious procedure through which a group representative can obtain recognition of a planning proceeding, as well as relief, both of an interim nature and on recognition, where it may be required to support the possibility of developing a group insolvency solution in the planning proceeding.

Article 20. Application for recognition of a foreign planning proceeding

137. Article 20 establishes the core procedural requirements of an application for recognition of a foreign planning proceeding. In incorporating the provision into national law, it is desirable that the process not be encumbered with requirements additional to those specified in paragraph 2.

Paragraph 1

138. Paragraph 1 establishes standing for a group representative to seek recognition in the enacting State of the foreign planning proceeding in which they have been appointed.

Paragraph 2

139. Article 20, paragraph 2 lists the documents or evidence that must be produced to support the application for recognition. Subparagraphs (a) to (c) focus on the evidence to be provided concerning the appointment of the group representative. To avoid refusal of recognition because of non-compliance with a mere technicality (e.g. where the applicant is unable to submit documents that in all details meet the requirements of subparagraphs (a) and (b)), subparagraph (c) allows evidence other than that specified in subparagraphs (a) and (b) to be taken into account. That provision, however, maintains the court's power to insist on the presentation of evidence acceptable to it. It is advisable to retain that flexibility in enacting the Model Law.

140. It will be recalled that the proceeding in which the group representative was appointed must meet the requirements of article 2, subparagraph (g) (i) and (ii) in order to become a planning proceeding. Article 20 makes no provision for the receiving court to embark on a consideration of whether the proceeding that has become the planning proceeding was correctly commenced under applicable law; provided the requirements of article 20 are met, recognition should follow in accordance with article 22.

141. What constitutes a "certified copy" should be determined by reference to the law of the State in which the foreign planning proceeding is taking place.

Paragraph 3

142. Paragraph 3 specifies various statements relating to the enterprise group and the foreign planning proceeding that should accompany an application for recognition of that planning proceeding. Subparagraph (a) requires a statement identifying each group member participating in the planning proceeding. Subparagraph (b) requires a statement identifying all members of the enterprise group and all insolvency proceedings known to the group representative that have commenced with respect to group members participating in the planning proceeding. Subparagraph (c) requires the group representative to provide a statement to the effect that the group member, in respect of which the insolvency proceeding that became the planning proceeding commenced, has its COMI in the jurisdiction in which that proceeding is taking place, in other words that the planning proceeding is a "main" proceeding.

143. Subparagraph (c) also requires a statement that the foreign planning proceeding is likely to result in added overall combined value for the group members subject to or participating in that proceeding. That might be possible where, for example, it can be shown that a group solution or a reorganization plan or a going concern sale that is being developed in the planning proceeding can preserve the value of the business (whether of the enterprise group as a whole or in part), that would otherwise be destroyed in an approach that treats individual group members separately.

144. The information referred to in paragraph 3 is required by the court for the purposes of recognition, but also for any decision granting relief in favour of a foreign planning proceeding. To tailor that relief appropriately and ensure it does not interfere with other insolvency proceedings, as required by articles 19, 21 and 23, the court needs to be aware of any other proceedings that may be taking place in third States concerning those group members participating in the planning proceeding. It will also provide the court with an idea of the overall structure of the group, as well as information on the relationship between group members subject to the planning proceeding and other group members, as well as on the group as a whole. This information may be particularly important in the context of coordination and cooperation.

Paragraph 4

145. Paragraph 4 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraph 2. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time if the court is in a position to consider the request without the need for translation of the documents.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [30]–[34]
A/CN.9/898, paras. 86–89
A/CN.9/WG.V/WP.146, footnotes 34–35
A/CN.9/903, paras. 113–114
A/CN.9/WG.V/WP.152, paras. 22–27
A/CN.9/931, paras. 53–55
A/CN.9/WG.V/WP.158, II, paras. 23–25
A/CN.9/937, para. 78
A/CN.9/WG.V/WP.161, para. 37

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

146. Article 21 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available as of the moment recognition of a foreign planning proceeding is sought (unlike the relief under article 23, which is also discretionary, but available only upon recognition). The rationale for making such interim relief available is to preserve the possibility of developing or implementing a

group insolvency solution, to protect the assets of an enterprise group member that is subject to or participating in a planning proceeding or to protect the interests of the creditors of any such a group member. The opening words of paragraph 1 allude to the urgency of the measures. The relief available under article 21, with the exception of subparagraph 1(g), is not limited to a single group member and can relate to both the group member subject to the planning proceeding, as well as to other group members participating in the planning proceeding under article 17.

147. Article 21 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings (i.e. the same type of relief as available under article 23), as opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure (i.e. measures covering specific assets identified by a creditor). The discretionary "collective" relief under article 21 is slightly narrower than the relief available under article 23 following recognition.

148. The objectives of making interim relief available, as noted above, could be frustrated if collective relief was not available. On the other hand, since recognition has not yet been granted, the collective relief is restricted to urgent and provisional measures. It might be noted that subparagraphs 1(a) to (f) apply to group members that are both subject to and participating in the foreign planning proceeding, while the relief available under subparagraph 1(g) is only available with respect to those group members participating in the planning proceeding.

Paragraph 1

149. Subparagraph (a) permits a stay to be granted to prevent execution against assets of the relevant group member, while subparagraph (b) limits the disposal of any assets of the relevant enterprise group member. Subparagraph (c) permits any insolvency proceedings commenced in the enacting State with respect to relevant group members to be stayed in order to assist the development of the group solution.

150. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 21, subparagraph 1(c). Those sanctions are likely to vary, depending on the legal system; they might include criminal sanctions, penalties and fines or the acts themselves might be void or capable of being set aside. From the viewpoint of creditors, the main purpose of such sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor and, for that purpose, the setting aside of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

151. Since article 21, subparagraph 1(d) repeats article 19, subparagraph 1(c), the same considerations apply (see paras. 125–126 above).

152. Subparagraph 1(e) provides for relief to protect certain types of assets that are perishable or otherwise susceptible to devaluation or deterioration. In the first instance, those assets could be entrusted to an insolvency representative appointed in the State receiving the application for recognition, in the situation where insolvency proceedings concerning the relevant group member have commenced in that State. Where no insolvency representative has been appointed or, for some reason, the insolvency representative is not able to properly administer or realize those assets, those tasks could be entrusted to the group representative or another person designated by the court in the receiving State. Entrusting those tasks to the group representative may give rise to concerns that since that position does not represent any particular insolvency estate, there are no assets that could afford some protection in the event of losses sustained through the actions of the group representative. It should be noted, however, that the Model Law contain several safeguards designed to ensure the protection of the interests of creditors and other stakeholders before assets can be turned over as provided in subparagraph 1(e). Those safeguards include: the provision in article 25, paragraph 1, that the court should not authorize the turnover of assets until it is assured that the interests of creditors and other stakeholders are protected;

and article 25, paragraph 2, according to which the court may subject the relief it grants to any conditions it considers appropriate.

153. Subparagraph 1(g) addresses an issue of some importance to reorganization and, in particular, the development of a group insolvency solution in the foreign planning proceeding. The continued operation of the group's business and activities after commencement of insolvency proceedings may be critical to reorganization and, to a lesser extent liquidation, where the group or various members of the group are to be sold as going concerns. If ongoing funding is not available to meet the costs of continuing the business(es), there is little prospect of reorganizing an enterprise group or selling some parts or all of it as a going concern. The purpose of subparagraph 1(g) is to enable the court to approve group funding arrangements as they relate to group members participating in the planning proceeding and to authorize the continued provision of funding under those arrangements. Article 25 would apply to enable the court to apply any conditions it may deem necessary to protect the interests of creditors and other stakeholders. [*The provision is limited to participating group members on the basis that .....*].

154. Subparagraph 1(h) enables the court to grant any additional forms of relief that might be available under the law of the enacting State and are needed in the circumstances of the case.

Paragraph 2

155. Laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 21 is granted. Paragraph 2 is the appropriate place for the enacting State to make provision for such notice.

Paragraph 3

156. Relief available under article 21 is provisional in that, as provided in paragraph 3, it terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure under article 23, subparagraph 1 (a). The court might wish to do so, for example, to avoid a hiatus between a provisional measure issued before recognition and a measure issued after recognition.

Paragraph 4

157. Paragraph 4, which is also included in articles 19 and 23, is intended to exclude the assets and operations of those group members not subject to insolvency proceedings from the relief provisions of the Model Law, unless the exception in the paragraph 4 applies. See the explanation provided in paragraphs 130–134 above.

Paragraph 5

158. Paragraph 5 is also included in articles 19 and 23 and pursues the objective of coordinating relief between insolvency proceedings affecting group members, especially where a group insolvency solution is being developed (see para. 135 above).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [35]–[38]
A/CN.9/898, paras. 90–101
A/CN.9/WG.V/WP.146, footnotes 36–40
A/CN.9/903, paras. 115–119
A/CN.9/WG.V/WP.152, paras. 28–31
A/CN.9/931, paras. 56–57
A/CN.9/WG.V/WP.158, section II, paras. 26–31
A/CN.9/937, paras. 70, 76 and 79
A/CN.9/WG.V/WP.161, paras. 38–39

Article 22. Decision to recognize a foreign planning proceeding

159. Article 22 is designed to ensure that, if the application meets the requirements set out in the article and if recognition is not contrary to the public policy of the enacting State (see art. 6), recognition will be granted. Article 22 thus aims to provide certainty and predictability with respect to the recognition process.

160. In deciding whether a foreign planning proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition, which requires a determination that the proceedings are a planning proceeding within article 2, subparagraph (g). Article 22 makes no provision for the receiving court to embark on a consideration of whether the planning proceeding was correctly commenced under applicable law; provided the requirements of article 20, paragraphs 2 and 3 are met, the application was submitted to the court specified in article 5 and article 6 is not applicable, recognition should follow in accordance with article 22.

Paragraph 2

161. The ability to obtain early recognition (and the consequential ability to invoke art. 23) is often essential for the effective protection of the assets of the debtor from dissipation and concealment. For that reason, paragraph 2 obligates the court to decide on the application "at the earliest possible time". The phrase "at the earliest possible time" has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, "the earliest possible time" might be measured in months. Interim relief will be available under article 21, if some order is necessary while the recognition application is pending.

Paragraph 3

162. A decision to recognize a foreign planning proceeding would normally be subject to review or rescission, in the same manner as any other court decision. Paragraph 3 clarifies that the decision on recognition may be revisited if it becomes apparent that the grounds for granting it were fully or partially lacking or have subsequently ceased to exist.

163. Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign planning proceeding has been terminated or if the nature of the underlying proceeding has changed (e.g. a reorganization proceeding might be converted into a liquidation proceeding) or if the status of the group representative's appointment has changed or the appointment has been terminated. Also, new facts might arise that require or justify a change of the court's decision, for example, if the group representative misled the court. The court's ability to review the recognition decision is assisted by the obligation imposed on the group representative under paragraph 4 to inform the court of such changed circumstances.

164. A decision on recognition may also be subject to a review of whether, in the decision-making process, the requirements for recognition were observed. Some appeal procedures give the appellate court the authority to review the merits of the case in its entirety, including factual aspects. It would be consistent with the purpose of the Model Law and with the nature of the decision granting recognition (which is limited to verifying whether the applicant fulfilled the requirements of article 22), if an appeal of the decision would be limited to the question of whether the requirements of articles 20 and 22 were observed in deciding to recognize the foreign planning proceeding.

Paragraph 4

165. Paragraph 4 obligates the group representative to inform the court promptly, after the time of the application for recognition of the foreign planning proceeding is

made, of any material changes in the status of the planning proceeding or the status of their appointment, as well as other changes that might have a bearing on the relief granted. When those changes occur before the decision on recognition is made, the purpose of the obligation is to allow the court to take those changes into consideration in making its decision on recognition. As noted above, it is possible that, after the application for recognition is made, changes occur in the planning proceeding that would have affected the decision on recognition or the relief granted on an interim basis. When the changes occur after recognition, they may affect the continuation of recognition and any relief granted based on recognition.

166. Changes relevant to paragraph 4 could include, for example, termination of the foreign planning proceeding, conversion of the underlying proceeding from one type of proceeding to another (e.g. from reorganization to liquidation), or changes concerning the information required under article 20, paragraph 3. Paragraph 4 takes into account the fact that technical modifications in the status of the proceedings or the group representative's appointment are frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information on "material" changes. It is particularly importance that the court be informed of such modifications when recognition is granted to a group representative "appointed on an interim basis" (see art. 2, subpara. (e)).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [39]–[40]
A/CN.9/898, paras. 91–92
A/CN.9/WG.V/WP.146, footnote 41
A/CN.9/903, para. 120
A/CN.9/WG.V/WP.152, paras. 31–32
A/CN.9/931, paras. 58–59
A/CN.9/WG.V/WP.158, II, paras. 32–33
A/CN.9/937, para. 89
A/CN.9/WG.V/WP.161, para. 40

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

167. A basic principle of the Model Law is to provide the relief considered necessary for the orderly and fair conduct of a cross-border insolvency, whether that is provided on an interim basis or as a consequence of recognition. As such, the text neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the foreign proceeding the relief that would be available under the law of the enacting State.

168. The relief available under article 23 is discretionary in nature and typical of the relief most frequently granted in insolvency proceedings. With the inclusion of subparagraph 1(i), the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case. The use of the words "upon recognition" in paragraph 1 aligns the drafting of that paragraph with article 21 of the MLCBI. Article 21 has been interpreted to mean that recognition is the pre-condition for granting discretionary relief and that that relief may be sought at any time after recognition has been granted; its availability is not limited to the time at which recognition is granted. Although in practice relief is often initially sought at the same time as recognition, this article ensures that it can be sought at a later time if required.

169. Since subparagraph 1(e) is the same as article 19, subparagraph 1(c), the explanation provided in paragraphs 125–126 above would also apply to article 23. Subparagraph 1(b) has been added to make it abundantly clear that the stay referred to in subparagraph 1(e) covers execution against the assets of the group member.

170. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 23, subparagraph 1(c) (see para. 124 above).

171. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 25, paragraph 2, which enables the court to subject the relief granted to any conditions it considers appropriate.

Paragraph 2

172. The "turnover" of assets as envisaged in paragraph 2 is discretionary. In the first instance, the assets may be turned over to the insolvency representative appointed in the recognizing State. Only where no such representative has been appointed or the appointed representative is unable to administer or realize those assets can they be turned over to the group representative or some other party designated by the court. It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative. Those safeguards include the following: the general statement in article 25, paragraph 1 of the principle of protection of local interests; and article 25, paragraph 2, according to which the court may subject any relief it grants to conditions it considers appropriate.

Paragraph 3

173. Paragraph 3 is also included in articles 19 and 21 and is intended to exclude from the relief provisions of the Model Law the assets and operations of a group member for which no insolvency proceeding has commenced, unless the exception in paragraph 3 applies. See the explanation provided in paragraphs 130–134 above.

Paragraph 4

174. Paragraph 4 repeats article 19, paragraph 3 and article 21, paragraph 5 (see para. 135 above).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [41]–[44]
A/CN.9/898, paras. 93–95
A/CN.9/WG.V/WP.146, footnotes 42–46
A/CN.9/903, paras. 121–124
A/CN.9/WG.V/WP.152, paras. 33–34
A/CN.9/931, para. 60
A/CN.9/WG.V/WP.158, II, paras. 34–35
A/CN.9/937, paras. 70, 76 and 79
A/CN.9/WG.V/WP.161, para. 41

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

175. The purpose of article 24 is to ensure that the group representative, as a consequence of recognition of the foreign planning proceeding, will have standing to participate in any insolvency proceeding taking place in the recognizing State with respect to a group member participating in the planning proceeding. In such a situation, "participation" by the group representative would typically include the ability to petition, request or make submissions to the court concerning issues such as protection, realization or distribution of assets of the group member or cooperation with the planning proceeding.

176. Under paragraph 2, the court may also approve participation by the group representative in any insolvency proceeding affecting a group member that is not participating in the foreign planning proceeding. This paragraph thus gives effect to

the group representative's ability under article 18, subparagraph 3(c) to seek such participation. Such participation might be relevant where, for example, the group member in question is not permitted to participate in the planning proceeding (e.g. where it is prohibited from doing so under art. 17, para. 2), where the group representative wishes to encourage a local court to permit the participation of an enterprise group member that has been prohibited from doing so, or where that group member, notwithstanding its non-participation, might be relevant to the development of the group solution.

177. Article 24 is limited to giving the group representative standing and does not vest that representative with any specific powers or rights. The article does not specify the kinds of motions that the group representative might make and does not affect the provisions of the insolvency law of the enacting State that govern the fate of any such motions.

178. If the law of the enacting State uses a term other than "participate" to express the concept, that other term might be used in enacting the provision.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [45]
A/CN.9/898, paras. 96–97
A/CN.9/WG.V/WP.146, footnote 47
A/CN.9/903, para. 125
A/CN.9/WG.V/WP.152, para. 35
A/CN.9/931, para. 61
A/CN.9/WG.V/WP.158, para. 36
A/CN.9/937, para. 83
A/CN.9/WG.V/WP.161, paras. 42–43

Article 25. Protection of creditors and other interested persons

179. The idea underlying article 25 is that there should be a balance between relief available under the Model Law and the interests of the persons that may be affected by such relief, which could include creditors of participating group members and other stakeholders, including the group member subject to the relief. This balance is essential to achieving the objectives of cross-border insolvency legislation. Paragraph 1 makes it clear that the reference to the creditors is to the creditors of those group members participating in the planning proceeding; it does not refer to the interests of creditors of the enterprise group generally or to creditors of group members not so involved in the planning proceeding.

180. The reference to the interests of creditors and other interested parties in article 25, paragraph 1, provides useful elements to guide the court in exercising its powers under the Model Law, particularly articles 19, 21 and 23 (but also art. 28). In order to tailor the relief appropriately, the court is clearly authorized, under article 25, paragraph 2, to subject the relief to conditions and, under article 25, paragraph 3, to modify or terminate any relief granted. An additional feature of paragraph 3 is that it expressly gives standing to the group representative, as well as to a person who may be affected by any relief granted under the Model Law, to petition the court to modify or terminate those consequences. Otherwise, article 25 is intended to operate in the context of the procedural system of the enacting State.

181. In many cases, the affected creditors will be "local" creditors. Nevertheless, in enacting article 25, it is not advisable to attempt to limit it to local creditors. Any express reference to local creditors in paragraph 1 would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting an appropriate text, but would also reveal that there is no justification for discriminating against creditors on the basis of criteria such as place of business or nationality. The general policy of the Model Law is that

all creditors, wherever they might be considered to be located, should be treaty fairly and as far as possible be accorded the same treatment.

182. Protection of all interested persons is linked to provisions in national laws on notification requirements. Those provisions may include general publicity requirements, designed to notify potentially interested persons (e.g. local creditors or local agents of a debtor) that a foreign planning proceeding has been recognized or there may be requirements for individual notifications that the court, under its own procedural rules, should issue to persons that would be directly affected by recognition or relief it might grant. National laws vary as to the form, time and content of notice required to be given of the recognition of foreign planning proceedings and the Model Law does not attempt to modify those laws.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [46]
A/CN.9/898, para. 98
A/CN.9/WG.V/WP.146, footnote 48
A/CN.9/903, para. 126
A/CN.9/WG.V/WP.152, para. 36
A/CN.9/931, para. 62
A/CN.9/WG.V/WP.158, paras. 37–40
A/CN.9/937, para. 84
A/CN.9/WG.V/WP.161, paras. 44–46

Article 26. Approval of a group insolvency solution

183. The purpose of article 26 is to address the approval of a group insolvency solution and the effect of approval in the enacting State. The basic principle is that while a group insolvency solution might be developed globally to address the insolvency of the group as a whole or in part, the solution should be approved locally with respect to affected individual group members, by the court of the State in which each affected group member has its COMI or an establishment, in accordance with the laws of that State. Recognition of the foreign planning proceeding in which the group insolvency solution was developed is not a pre-condition for approval of the relevant part of the group solution.

184. Article 26 does not address the procedure for seeking approval of the solution, leaving it to the law of the approving State to indicate the approvals and procedures required. However, once those approvals have been obtained, the solution should have effect in that State. Where the group insolvency solution affects or modifies a group member's interests, it may be helpful to the approving court to see the solution in its entirety, rather than only the portion affecting the particular group member. That approach would provide the court with the overall context for resolving the group's financial difficulties of which the particular portion is a part. It would also assist the court in assessing the potential success of the group insolvency solution, which may be relevant to a decision to stay or decline to commence a proceeding under articles 28 or 30.

Paragraph 2

185. The purpose of the Model Law is to increase and harmonize cross-border assistance available in the enacting State to group representatives. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a group representative could obtain cross-border assistance and since it is not the purpose of the Law to displace those provisions to the extent that they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether paragraph 2 is needed to make that point clear.

Paragraph 3

186. Paragraph 3 establishes standing for the group representative to be heard in the enacting State on any issues relating to the approval and implementation of the group insolvency solution. According the group representative standing is intended to ensure cooperation and coordination between the courts of the enacting State and the foreign planning proceeding. It would enable the group representative to bring to the attention of the court information that might be relevant to development and implementation of the group solution and to be heard on any issues that might be relevant to approval of the relevant portion of the group solution in the enacting State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [47]–[51]
A/CN.9/898, paras. 99–100
A/CN.9/WG.V/WP.146, footnote 49
A/CN.9/903, paras. 127–129
A/CN.9/WG.V/WP.152, paras. 46–49
A/CN.9/931, paras. 63–64
A/CN.9/WG.V/WP.158, paras. 41–47
A/CN.9/937, paras. 85–91
A/CN.9/WG.V/WP.161, paras. 47–48

Chapter 5. Treatment of foreign claims

187. Certain measures have been developed in practice to assist the coordination of cross-border insolvency proceedings involving members of an enterprise group. Often referred to as synthetic non-main proceedings, these measures involve according the claim of a foreign creditor the same treatment in a main proceeding as it would have received in a foreign non-main proceeding under the applicable law, were such a non-main proceeding to commence. For example, if a main proceeding for a particular group member commences in one State and that group member has creditors in another State, the claims of those creditors can be addressed in the first State in accordance with the treatment they would have received under the relevant applicable law if a non-main proceeding had commenced in the second State.

188. The treatment to be accorded to the foreign claims typically relies upon an undertaking given by the insolvency representative appointed in the main proceeding or, where a group representative has been appointed in a planning proceeding, by the insolvency representative and the group representative jointly. To ensure a creditor will have recourse in the event the undertaking is not performed, the undertaking should be binding and enforceable upon the insolvency estate in the main proceeding.

189. For the purposes of article 27, the reference to “treatment” of the foreign claim means that when the insolvency representative giving the undertaking distributes assets or proceeds received as a result of the realization of assets, it will comply with the distribution and priority rights under the national law that governs those claims, thus according them the treatment they would have received in non-main proceedings. The entitlement of a foreign creditor under the applicable law might be greater than their entitlement under the law of the main proceedings. In practice, any concern that may have arisen on that issue has been addressed by the court of the main proceeding approving the payment of those entitlements in accordance with the foreign law, in order to achieve the purpose of the main proceedings.

190. The purpose of these measures is to facilitate the coordinated treatment of claims and to minimize the need, or limit the circumstances in which it might be necessary, to commence a non-main proceeding. They have been used in enterprise group cases where a group-wide solution is being devised or pursued in a main proceeding for multiple group members (which may have commenced in a single jurisdiction) and the commencement of non-main proceedings for any of those group members in another jurisdiction would have adversely affected the achievement of

that solution. Although typically used in a group context, these measures have also been applied in respect of individual debtors.

191. The use of these measures may have numerous benefits, including: cost savings associated with minimizing the number of insolvency proceedings required to administer the insolvency of enterprise group members (e.g. payment of the fees of only one insolvency representative and the costs of only one court); shorter time frames for completion of the proceedings with fewer disputes and less competition between different proceedings; more efficient creditor participation; reduced need for coordination and cooperation between potentially numerous concurrent proceedings; more effective cross-border reorganization; and reduction of the obstructions caused by the removal of part of the assets of the debtor from the control of the insolvency representative of the main proceeding.

192. There may be situations in which the use of such measures may be limited. For example, where the law applicable to the foreign claims in their State of origin cannot be applied in the main proceedings in the other State; where the claims in the State of origin are not of a purely monetary nature and cannot realistically be treated in the main proceeding as they may require, for example, some kind of sanction by the courts of the State of origin; or where there are irreconcilable differences between the insolvency law of the State of origin of the claims and the law applicable law to the main proceeding.

193. Certain safeguards are typically associated with the use of these measures. Those safeguards are principally directed at protecting the interests of the creditors whose claims are subject to treatment in the foreign main proceeding and ensuring that they receive what is promised in the undertaking. Approval by the court in the main proceeding, as well as by the courts in the State in which the non-main proceeding could have been commenced, may assist in achieving creditor protection.

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

194. Article 27 deals with the situation in which an insolvency representative appointed in a main proceeding in the enacting State gives an undertaking to accord certain treatment in that main proceeding to foreign claims that could be brought in the State in which the relevant enterprise group member has an establishment. The purpose of this provision is to minimize the commencement of non-main proceedings in that second State and facilitate the centralized treatment of claims in an enterprise group insolvency.

195. The measures referred to in article 27 are intended to apply independently of the existence of a planning proceeding, and thus would also be relevant where there is no agreement to have a planning proceeding or the pre-conditions for such a proceeding do not exist.

196. Although the use of these measures in practice is typical in situations where the main and non-main proceedings relate to the same group member, the drafting of the provision does not preclude application of the provision in situation in which those proceedings relate to different group members. For example, the provision could be used in the following two situations: (a) a claim that could be brought in a non-main proceeding in one State relating to a group member that is subject to a main proceeding in the enacting State could be treated in that main proceeding in accordance with the law applicable to the claim; and (b) a claim that could be brought in a non-main proceeding in one State relating to a group member that is participating in a planning proceeding in the enacting State could be treated in the planning proceeding in accordance with the law applicable to the claim. Application in the second scenario would seem to be a logical extension of the provisions permitting such participation provided the court in the State where the non-main proceeding could be brought does not prevent it (art. 17, para. 2).

197. To accord the prescribed treatment, the Model Law requires an undertaking to be given by the insolvency representative appointed in a main proceeding in the enacting State. Where a group representative has been appointed and the main proceeding has become a planning proceeding, the undertaking should be given jointly by the insolvency and the group representatives. While the goal of the Model Law is to create a new framework in which the group representative is authorized to undertake certain functions with respect to the planning proceeding, the requirement for a joint undertaking reflects various concerns. These include that since the group representative is appointed as a representative of the planning proceeding, rather than of a particular insolvency estate (unless the group representative and the insolvency representative of the underlying COMI proceeding are the same person), there are no assets that can be relied upon to support the giving of an undertaking of the kind referred to in article 27, paragraph 1. However, where the undertaking is given jointly, the assets of the insolvency estate to which the insolvency representative has been appointed can provide support for the undertaking, as provided by paragraph 2, and the undertaking will thus be binding upon that insolvency estate.

198. The undertaking should meet the formal requirements of the law of the enacting State, including any requirements as to form and language. The law of that State might also require the undertaking to include or be accompanied by additional information, such as statements specifying the facts and assumptions upon which it is based, including the value of the assets located in the non-main State and the options for realization of those assets.

199. Where the insolvency representative and the group representative are the same person, provisions addressing potential conflict of interest would become relevant (see para. 102 above).

200. The Model Law does not address the sanctions that might be applicable if the representative giving the undertaking fails to provide the treatment agreed, leaving that issue to the law of the State that governs the undertaking (see, for example, the discussion on sanctions that may be applicable to acts preformed in defiance of a suspension of transfer of assets in para. 124 above).

201. Paragraph 1, subparagraph (c) requires the court in which the main proceeding is taking place to approve the treatment to be accorded to the foreign creditors pursuant to the undertaking.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 102–103
A/CN.9/WG.V/WP.146, footnote 50
A/CN.9/903, paras. 130–135
A/CN.9/WG.V/WP.152, para. 40
A/CN.9/931, paras. 45–47
A/CN.9/WG.V/WP.158, para. 48
A/CN.9/937, paras. 92–96
A/CN.9/WG.V/WP.161, para. 49

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

202. Non-main insolvency proceedings can serve different purposes, in addition to the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a single unit, or the differences in the legal systems concerned are so great that difficulties may arise if the effects deriving from the law of the State of the commencement of proceedings are extended to other States where the debtor's assets are located. In other circumstances, non-main insolvency proceedings may hamper the efficient administration of insolvency estates. For that reason, article 28 enables (but does not require) the court of the enacting State, which is the State in which the claim would have been brought but for undertaking given

under article 27, to approve the treatment to be accorded in the (foreign) main proceeding and to stay any non-main proceedings already commenced or refuse the commencement of such proceedings.

203. If the court does stay non-main proceedings in that manner, article 25 would apply and the court should be satisfied that the interests of the creditors and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected. Relevant considerations might include whether the commencement of the non-main proceedings: (a) would improve either protection of the creditor's interests or the realization of assets in the enacting State; (b) were required to address the claims or the realization of assets in the enacting State; (c) might impede achievement of the purpose of the proceedings in the main State, for example where the goal of those proceedings was reorganization, and any proceedings sought in the enacting State would be liquidation; and (d) might interfere with the conduct of the proceedings in the main State and the development and implementation of a global insolvency solution.

204. Recognition of the foreign main proceeding is not a requirement for a court to take the action contemplated by article 28, and the other relief provisions of the Model Law therefore do not apply (unless art. 31, which is an optional provision, is also enacted — see below). As noted above, the use of this article and article 27 is not limited to the situation in which there is a planning proceeding and may thus apply in the group context where there is no planning proceeding or in respect of individual debtors.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 102–103
A/CN.9/WG.V/WP.146, footnote 50
A/CN.9/903, paras. 130–135
A/CN.9/WG.V/WP.152, paras. 41–42
A/CN.9/931, para. 48
A/CN.9/WG.V/WP.158, para. 49
A/CN.9/937, para. 97

Part B

Supplemental provisions

205. Articles 29, 30 and 31 are optional provisions that a State may wish to enact. As such, they take the core provisions in part A, chapter 5 a step further. Article 29 permits use of the measures described in articles 27 and 28 in a proceeding taking place in the enacting State with respect to a group member whose COMI is in another jurisdiction. The court of the enacting State is permitted to approve the use of such measures under article 30 and, under article 31, paragraph 1, to provide additional relief, including staying or declining to commence a main proceeding. With respect to a group insolvency solution, the court is given the power to approve, under article 31, paragraph 2, the portion of a group solution relating to a local group member, provided it determines that creditors are or will be adequately protected under the solution (in that case, art. 26 concerning approval of a group insolvency solution would not apply). These measures can help to avoid duplication of proceedings and minimize costs and conflicts between proceedings affecting group members, including where a group solution is contemplated for an integrated group.

206. Use of the optional provisions might result, however, in a group member's insolvency being handled in a manner that is not consistent with the prior expectations of creditors and other third parties, namely that the legal entity would be subject to, for example, insolvency proceedings in the jurisdiction in which its COMI was located. As a consequence, departing from that basic principle of commencing proceedings on the basis of COMI should be limited to exceptional circumstances, namely to cases where the benefits, in terms of efficiency, largely outweigh any

negative effect on creditors' expectations in particular and legal certainty in general. This approach would appear to be justified only in the instances noted above in paragraph 26.

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

207. Article 29 expands upon the concept introduced in article 27, permitting treatment of a foreign claim in a proceeding in the enacting State, irrespective of whether that proceeding is a main or non-main proceeding (although it might be noted that where the group representative appointed in the enacting State is giving the undertaking, the proceeding must be a main proceeding in accordance with article 18).

208. The offer under article 29 can be made either by an insolvency representative appointed in a State other than the enacting State (e.g., to facilitate the conduct in a single jurisdiction of insolvency proceedings relating to multiple group members based in different States, whether or not a group solution is ultimately developed), or by a group representative appointed in a planning proceeding in the enacting State.

209. As is the case under article 27, the Model Law requires the undertaking to meet the formal requirements of the law of the enacting State, including requirements as to form and language. Unlike article 27, however, there is no requirement for the court of the enacting State to approve the treatment to be accorded pursuant to the undertaking; the article preserves the court's discretion with respect to approval. Such an offer of treatment in the enacting State under article 29 enables a court in the other State to decline to commence a main proceeding, pursuant to article 30, subparagraph (b).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 104–107
A/CN.9/WG.V/WP.146, footnote 51
A/CN.9/903, paras. 136–137
A/CN.9/WG.V/WP.152, para. 57
A/CN.9/931, paras. 49–50
A/CN.9/WG.V/WP.158, paras. 50–52
A/CN.9/937, para. 98
A/CN.9/WG.V/WP.161, para. 50

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

210. Like article 28, article 30 addresses the situation in which the enacting State is the State in which the claim would have been brought but for the undertaking given under article 29 in another State. Unlike article 29, however, the enacting State may be the location of the relevant group member's COMI. It enables the court of the enacting State to approve the treatment to be afforded to the claims of local creditors in the foreign proceeding and to stay any main proceeding already commenced or decline to commence such a main proceeding. In so doing, the court should be satisfied, in accordance with article 25, that the interests of the creditors and other interested persons, including the enterprise group member in respect of which the claims could otherwise be brought, are adequately protected.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 104–107
A/CN.9/WG.V/WP.146, footnote 51
A/CN.9/903, paras. 136–137
A/CN.9/WG.V/WP.152, paras. 58–59
A/CN.9/931, para. 51

A/CN.9/WG.V/WP.158, para. 53
A/CN.9/937, para. 99
A/CN.9/WG.V/WP.161, para. 51

Article 31. Additional relief

211. The additional relief available under article 31 will only apply if a State decides to enact the supplemental provisions. Since application of article 31 requires recognition of a planning proceeding, it provides relief that is additional to that available under article 23 of the Model Law.

212. Paragraph 1 permits the court of the enacting State, following recognition of a foreign planning proceeding, to stay or decline to commence an insolvency proceeding relating to a group member participating in that planning proceeding, provided it is satisfied that the interests of creditors of that participating group member are or will be adequately protected in the planning proceeding. As such, article 31 is broader than articles 28 and 30 because the court's decision is not based upon an undertaking of the kind referred to in article 27 or 29, but rather on the court satisfying itself that adequate protection is or will be provided in the planning proceeding.

213. Where the court decides not to commence a proceeding under paragraph 1, relief under article 23 would still be available because the group member, while not subject to an insolvency proceeding, would fall within the terms of the exception in article 23, paragraph 3 i.e. the proceeding was not commenced for the purpose of minimizing the commencement of proceedings in accordance with the Model Law.

214. Paragraph 2 provides a means of approving a group insolvency solution that is different to that referred to in article 26. Where a group insolvency solution has been submitted to the court for approval, the court itself can approve the solution if it is satisfied that the interests of creditors of affected enterprise group members are or will be adequately protected in the solution. The provision also specifies that the court may grant any relief available under article 23 that might be necessary for implementation of the solution. Without that specific authorization, relief under article 23 is only available following recognition of a planning proceeding, which is not a pre-condition for the operation of article 31, paragraph 2.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [56]–[57]
A/CN.9/898, pars. 108
A/CN.9/WG.V/WP.146, footnotes 52–53
A/CN.9/903, para. 138
A/CN.9/WG.V/WP.152, para. 60
A/CN.9/931, para. 52
A/CN.9/WG.V/WP.158, para. 54
A/CN.9/937, paras. 100–103
A/CN.9/WG.V/WP.161, para. 52

VI. Assistance from the UNCITRAL Secretariat

A. Assistance in drafting legislation

215. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@un.org; Internet home page: http://www.uncitral.org).

B. Information on the interpretation of legislation based on the Model Law

216. The Case Law on UNCITRAL Texts (CLOUT) information system is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL, including the Model Law. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The Secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.