UNCITRAL
Model Law on Enterprise Group Insolvency with Guide to Enactment

UNITED NATIONS

Further information may be obtained from:

UNCITRAL secretariat, Vienna International Centre
P.O. Box 500, 1400 Vienna, Austria

Telephone: (+43-1) 26060-4060
Telefax: (+43-1) 26060-5813
Internet: uncitral.un.org
E-mail: uncitral@un.org

United Nations Commission on International Trade Law

UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment

UNITED NATIONS
Vienna, 2020

Note

Symbols of United Nations documents are composed of letters combined with figures. Mention of such symbols indicates a reference to a United Nations document.

UNITED NATIONS PUBLICATION
Sales No.: E.20.V.3
ISBN 978-92-1-130400-8
e-ISBN 978-92-1-004807-1

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

Contents

Part one

UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

Part two

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

Part one
UNCITRAL Model Law on Enterprise Group Insolvency

Part A. Core provisions

Chapter 1. General provisions

Preamble

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

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

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

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

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

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

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

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

Article 1. Scope

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

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

Article 2. Definitions

For the purposes of this Law:

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

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

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

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

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

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

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

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

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

(iii) A group representative has been appointed;

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

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

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

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

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

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

Article 3. International obligations of this State

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

Article 4. Jurisdiction of the enacting State

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

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

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

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

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

Article 5. Competent court or authority

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

Article 6. Public policy exception

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

Article 7. Interpretation

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

Article 8. Additional assistance under other laws

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

Chapter 2. Cooperation and coordination

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

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group

representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 12. Coordination of hearings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 3. Appointment of a group representative and relief available in a planning proceeding in this State

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

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

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

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

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

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

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

Article 20. Relief available to a planning proceeding

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

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

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

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

(d) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another

person designated by the court, in order to protect, preserve, realize or enhance the value of assets;

(e) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

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

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

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

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

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

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 21. Application for recognition of a foreign planning proceeding

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

2. An application for recognition shall be accompanied by:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

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

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

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

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

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

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

Article 23. Recognition of a foreign planning proceeding

1. A foreign planning proceeding shall be recognized if:

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

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

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

2. An application for recognition of a foreign planning proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of material changes in the status of the foreign planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

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

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

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

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

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

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

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

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

of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

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

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

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

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

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

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

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

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

Article 26. Approval of a group insolvency solution

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

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

Chapter 5. Protection of creditors and other interested persons

Article 27. Protection of creditors and other interested persons

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

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

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

Chapter 6. Treatment of foreign claims

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

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

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

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

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

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

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

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

(a) Approve the treatment to be provided in the foreign main proceeding to the claims that might otherwise be brought in a non-main proceeding in this State; and

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

Part B. Supplemental provisions

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

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

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

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

(a) Approve the treatment in the foreign insolvency proceeding of the claims that might otherwise be brought in a proceeding in this State; and

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

Article 32. Additional relief

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

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

Part two
Guide to Enactment of the UNCITRAL 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 (the Model Law), adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 2019, is designed to equip States with modern legislation addressing the domestic and cross-border insolvency of enterprise groups, complementing the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and part three of the *UNCITRAL Legislative Guide on Insolvency Law* (the *Legislative Guide*, part three).

2. The Model Law 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 a group insolvency solution for the whole or part of an enterprise group through a single insolvency proceeding commenced at the location where at least one group member has the centre of its main interests (COMI);

(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 enterprise group members and access to foreign courts for enterprise group members and representatives;

(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 enterprise group insolvency 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, as well as measures to support the recognition and formulation of a group insolvency solution;

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

(h) The formulation and recognition of a group insolvency solution.

3. What distinguishes the Model Law from MLCBI, which concerns itself with insolvency proceedings concerning a single debtor, is the focus on insolvency proceedings relating to multiple debtors that are members of the same enterprise group. Measures provided by the Model Law, although they draw upon and, in several respects, are similar to the measures available under MLCBI, are designed to address 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 (New York, 21 June–9 July 2010),[1] the Commission adopted the Legislative Guide, part three, 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 MLCBI relating to centre of main interests and possibly to develop a model law or provisions 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-seventh session (New York, 7–18 July 2014), the Commission expressed support for continuing the work on insolvency of enterprise groups by

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

[2] Ibid., para. 259*(a)*.

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 195–198.

developing provisions on a number of issues, some of which would extend the existing provisions of 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 December 2018, the Working Group devoting a part of 10 sessions (forty-fifth–fifty-fourth) 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 8 to 19 July 2019. UNCITRAL adopted the Model Law by consensus on 15 July 2019 (see annex II of this publication). In addition to the 60 States members of UNCITRAL, representatives of 31 observer States and 34 international organizations participated in the deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution 74/184 of 18 December 2019 (see annex I of this publication), in which it expressed appreciation to UNCITRAL for finalizing and adopting the Model Law and its Guide to Enactment and recommended that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency, bearing in mind the need for internationally harmonized legislation governing and facilitating instances of enterprise groups in insolvency.

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 (see paras. 12–13 below).

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. The Commission adopted the Guide to Enactment of the UNCITRAL Model Law on Enterprise Group Insolvency at its fifty-second session together with the Model Law (see para. 7 above).

[4] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

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 a UNCITRAL model law usually invites States that have used the text to advise the Commission accordingly.

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

A. Fitting the Model Law into existing national law

12. The Model Law is intended to operate as an integral part of the existing law of the enacting State. In incorporating the text of the Model Law into its legal system, a State may modify or elect not to incorporate some of its provisions. The flexibility to introduce modifications in the Model Law should however be utilized with due consideration for the need for uniformity in its interpretation (see notes on art. 7 below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in treating enterprise group insolvency.

13. In order to achieve a satisfactory degree of harmonization and certainty, States may therefore 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. While the Model Law has been drafted as a standalone text, States that have enacted or are considering enacting MLCBI and the Model Law might note that several provisions of MLCBI are repeated in the Model Law with some adjustments dictated by the different scope of the Model Law and the use of enterprise group insolvency specific terminology (see section B below). Those MLCBI provisions include articles 3 (on international obligations), 4 (on competent court or authority), 6 (on public policy exception), 7 (on additional assistance under other laws), 8 (on

interpretation), 10 (on limited jurisdiction), 22 (on protection of creditors and other interested persons) as well as provisions of article 16 on presumption of authenticity of documents submitted in support of the application for recognition and provisions on relief, recognition and cooperation. Additional considerations may arise from the enactment of the Model Law either simultaneously with, or subsequent to, the enactment of MLCBI and the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The Secretariat may provide technical assistance with identifying those considerations on a case-by-case basis (see chap. VI below).

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.

16. The Model Law refers directly to "insolvency proceedings" rather than to a proceeding commenced under the laws of the enacting State relating to insolvency as in MLCBI. This approach is used only to simplify the drafting of the Model Law since the definition of "insolvency proceedings" (see paras. 18–19 below) already refers to those proceedings being commenced pursuant to the law relating to insolvency. It is not intended to signify a departure from the approach of MLCBI; both texts should be interpreted as applying to proceedings commenced under the law of the enacting State relating to insolvency.

17. Chapter 4 refers to "foreign planning proceedings" to ensure there is a clear distinction between that chapter, which introduces a regime for cross-border recognition of foreign planning proceedings, and chapter 3 which refers only to a planning proceeding commenced in the enacting State. Chapter 2 refers generally to "insolvency proceedings" as it may apply both in the situation where there are domestic and foreign proceedings, as well as situations in which there are multiple domestic proceedings and it is desirable that there be cooperation and coordination between those proceedings.

"Insolvency proceeding"

18. 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 MLCBI (art. 2, subpara. *(a)*).

19. 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 MLCBI with respect to the definition of "foreign proceeding", at paragraphs 65–80.

"This State"

20. The words "this State" are used throughout the text to refer to the State that enacts the text (i.e., the enacting State), which may include a territorial unit in a State with a federal system.

"Court"

21. Like MLCBI, the Model Law envisages the functions referred to in the Model Law (i.e., those relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative) 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

22. These words are used throughout 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 enterprise group member that is only participating in an insolvency proceeding, principally a planning proceeding. Participation is described in article 18. 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, an enterprise group member "subject to" a planning proceeding is the insolvency debtor in the main proceeding that led to the planning proceeding under article 2, subparagraph *(g)*.

"Main proceeding"

23. The Model Law defines this term by reference to the concept of an enterprise group member's COMI, drawing upon the substance of the definition of "foreign main proceeding" contained in article 2, subparagraph *(b)* of MLCBI. The Model Law does not define an enterprise group member's COMI, but as is the case with MLCBI, it should be interpreted by reference to the explanatory materials contained in the Guide to Enactment and Interpretation of MLCBI at paragraphs 144–147.

"Non-main proceeding"

24. The Model Law defines this term by adopting the definition of "foreign non-main proceeding" contained in article 2, subparagraph *(c)* of 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 MLCBI.

"Assets and operations"

25. The Model Law refers to "assets and operations" of enterprise group members to include physical assets (such as business premises), non-physical assets (such as intellectual property rights and licenses) and operations of the business (such as accounting and auditing services). In some instances, assets may be owned by one enterprise group member, while various operations of that group member may be performed by another enterprise group member or a third party.

IV. Main features of the Model Law

26. As indicated above, the Model Law is intended to provide a legislative framework to address the insolvency of an enterprise group, including both domestic and cross-border aspects of that insolvency. Part A is a set of core provisions, dealing with matters that are regarded as key to facilitating the conduct of enterprise group insolvencies. Part B, comprising articles 30–32, includes several supplemental provisions that go further than the measures provided in the core provisions, as explained further in paragraph 28 below.

27. Part A, chapters 1, 3 and 5 are intended to supplement domestic insolvency law and facilitate the conduct of insolvency proceedings affecting two or more enterprise group members in the enacting State. Chapter 2 provides a framework for cross-border cooperation and coordination with respect to multiple proceedings affecting enterprise group members; these provisions draw upon 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 enterprise group, as well as approval of a group insolvency solution, again drawing upon the recognition regime provided by MLCBI. Chapter 5, which consists of a single article that addresses protection of the interests of creditors and other interested persons, is intended to apply to relief granted under chapters 3, 4 and 6. Chapter 6 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 enterprise group member taking place in another jurisdiction in accordance with the treatment they would be accorded in a non-main jurisdiction, provided that an undertaking to accord such treatment

has been given in the main proceeding. Where such an undertaking has been given, chapter 6 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 below.

28. Part B sets out supplemental provisions that have been included for States that may wish to adopt a more extensive approach with respect to treatment of the claims of foreign creditors. 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 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.

29. Creditors and other third parties usually expect that a company would be subject to insolvency proceedings in the jurisdiction of that company's COMI. The use of the supplemental provisions might bring a different result. Any departure from the basic principle that insolvency proceedings commence in the jurisdiction of a company's COMI should therefore 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 enterprise 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 enterprise group member's COMI); and

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

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

Documents referred to in this Guide

31. *(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"

32. 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

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

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

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

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

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

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

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

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

33. 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 a group insolvency solution that might apply to the whole or part of that enterprise group. This goal is in contrast (but complementary) to that of MLCBI, which focuses on multiple proceedings for a single debtor.

34. 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, II, paras. 1–2

A/CN.9/966, para. 84

Article 1. Scope

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

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

35. 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. Coordination and cooperation between those proceedings may 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).

36. 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 MLCBI. With a view to making the domestic 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.

37. Like 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, paragraph 2, to participate in a planning proceeding in accordance with article 18, 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.

38. 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, II, 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, II, para. 3
A/CN.9/966, para. 84

Article 2. Definitions

For the purposes of this Law:

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

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

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

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

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

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

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

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

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

(iii) A group representative has been appointed.

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

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

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

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

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

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

39. 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" (subpara. *(b)*) refers both to "control" and "significant ownership". While the Model Law defines the term "control" in subparagraph *(c)*, it leaves it to enacting States to consider defining the term "significant ownership" upon enactment of the Model Law according to domestic requirements, to avoid possible uncertainties and litigation. Enacting States may consider discussions of "control" and "ownership" in the Legislative Guide, part three (chap. I, paras. 26 to 30). The definition of "enterprise group member" in subparagraph *(d)* is provided to circumscribe the limits of the use of that term throughout the text.

40. Other definitions are taken from, or are based upon, MLCBI, namely "insolvency proceeding", "insolvency 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 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 MLCBI.

41. The definition of "group representative" is based upon the definitions of "foreign representative" in MLCBI (art. 2, subpara. *(d)*) and "insolvency representative" in the Legislative Guide (Introd., subpara. 12*(v)*). The functions that the group representative is authorized to undertake within the framework of the Model Law are described in the substantive articles (e.g., arts. 19, 21 and 25) but they mostly cover those related to a foreign planning proceeding. Domestic law would need to address in more detail the powers of the group representative in the enacting State with respect to domestic planning proceedings. Some of those powers are already covered by the Model Law, such as the authority to seek relief under article 19, paragraph 2. Additional powers may include the ability to participate in proceedings concerning group members. An enacting State for which the concept of "group representative" is new would need to remove any ambiguities as regards the group representative's prerogatives as compared to those of the insolvency representative with respect to a domestically initiated planning proceeding. It might be noted that an insolvency representative appointed on commencement of a main proceeding that led to 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. It may be desirable to separate the functions of insolvency representative and group representative in certain situations, in particular in order to avoid a possible conflict of interests, as discussed in paragraph 104 below.

42. "Group insolvency solution" is a new term and is intended to be a flexible concept. A group insolvency solution 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 enterprise group members and other factors. 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 enterprise 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.

43. 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 enterprise group members. There may

be other ways of dealing with creditor claims, depending on the availability of the mechanisms elaborated in articles 28 and 30, that could facilitate the treatment of foreign creditor claims in an insolvency proceeding in one State in accordance with the treatment they would have received in an insolvency proceeding in another State.

44. "Planning proceeding" is also a new term. It is intended to refer to the proceeding through which a group insolvency solution could be developed. Such proceeding under the Model Law is, as a general rule, a "main proceeding" commenced with respect to an enterprise group member. A "main proceeding" is defined as a proceeding taking place in the State where the debtor has COMI (art. 2, subpara. *(j)*), drawing on the definition of a "foreign main proceeding" in MLCBI (art. 2, subpara. *(b)*). The meaning and interpretation of COMI is discussed in detail in the Guide to Enactment and Interpretation of MLCBI (at paras. 144–149) and in the Judicial Perspective (at paras. 93–135). Article 16, paragraph 3, of 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 COMI. The additional text at the end of the definition in subparagraph *(g)* of the Model Law indicates that a court could, subject to subparagraphs *(g)* (i) to (iii), recognize as a planning proceeding a proceeding that is separate to the main proceeding, provided that the separate proceeding has been approved by the court with jurisdiction over the main proceeding.

45. 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 enterprise group is horizontally organized in relatively independent units or where different plans are required for different parts of the enterprise group, more than one planning proceeding could be envisaged.

46. The enterprise group member with respect to which the planning proceeding commences must be one that is likely to be a necessary and integral part of the resolution of the enterprise group's (or a part of the enterprise 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 enterprise group member. The main proceeding commenced with respect to that enterprise group member can become a planning proceeding and that enterprise group member is described in the text as being "subject to" the planning proceeding. A main proceeding commenced with respect to an enterprise group member that would be peripheral to the development of a group insolvency solution cannot become a planning proceeding, although that enterprise group member could participate in the planning proceeding. No criteria are provided for determining whether an enterprise group member is likely to be a necessary and integral part of a group insolvency solution, as this will depend on several factors. Those relate to the structure of the enterprise group, the degree

of integration between members, the group insolvency solution that is to be proposed, the members that will need to be included in that group insolvency solution and so forth.

47. To facilitate the development and implementation of a group insolvency solution, the text provides for the relevant enterprise group members to "participate" in the planning proceeding (art. 18). Those group members may also have COMI or an establishment in the State in which the planning proceeding is taking place or in another State. In either case, article 18 makes it clear that participation is voluntary and that an enterprise group member may commence or opt out of participation at any time; the ability to do so would not have any impact on the operation of the Model Law. Article 18 also establishes the legal effect of such participation. In terms of participation in a planning proceeding, the Model Law simply refers to enterprise group members regardless of whether an enterprise group member is solvent or insolvent or subject to insolvency proceedings. The central idea is that participation of all enterprise group members relevant to development of the group insolvency solution should be facilitated, irrespective of their financial status.

48. However, the Model Law makes it clear that relief in support of a planning proceeding (art. 20, para. 2) or of recognition of a foreign planning proceeding (art. 22, para. 4, and art. 24, para. 3) may not be granted with respect to the assets and operations of an enterprise group member for which no insolvency proceeding has commenced, unless the reason for not commencing relates to the goal of minimizing commencement of insolvency 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 insolvency proceedings, when other mechanisms to simplify insolvency proceedings relating to the enterprise group might be available. These might include the availability of measures such as an undertaking of the type contemplated in article 28. 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 enterprise group member for which no insolvency proceeding has commenced. That said, nothing in the Model Law is intended to preclude an enterprise group member from voluntarily participating in or contributing to a planning proceeding.

49. 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. 17, 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 Model Law. 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 planning proceeding

commences. General considerations with respect to appointments of an insolvency representative discussed in the Legislative Guide, part two, chapter III, paragraphs 35–74 and recommendations 115–125 may be taken into account.

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, II, 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, II, paras. 4–5
A/CN.9/966, paras. 41–48 and 85–97

Article 3. International obligations of this State

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

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

51. To the extent that the domestic enactment of the Model Law conflicts with obligations of the enacting State arising out of a treaty or agreement binding on that State, the requirements of that treaty or agreement will usually prevail. Binding legal obligations issued by regional economic integration organizations that are applicable to members of that organization may be treated as obligations arising from an international treaty or agreement. The provision can also be adapted in domestic law to refer to binding international instruments with non-State entities, where such instruments could apply to matters within the scope of the Model Law.

52. 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 or agreements. For example, the article might result in giving precedence to international treaties or agreements that, while dealing with matters covered also by the Model Law (e.g., access to courts and cooperation between courts or

administrative authorities, such as court officials), were aimed at the resolution of problems other than those addressed by the Model Law. Some of those treaties or agreements, only because of their imprecise or broad formulation, may be misunderstood as dealing also with matters addressed 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 domestic law, a sufficient link must exist between the international treaty or agreement concerned and the issue governed by the provision of the domestic 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 or agreement concerned has to deal specifically with insolvency matters in order to satisfy that condition.

53. In some States binding international treaties or agreements are self-executing. Where they are not self-executing, 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, II, para. 6
A/CN.9/966, para. 98

Article 4. Jurisdiction of the enacting State

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

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

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

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

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

54. 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)* explained below.

Subparagraph (a)

55. Subparagraph *(a)* confirms that nothing in the Model Law is intended to limit the jurisdiction of the courts of the enacting State with respect to any enterprise group member that has COMI in that State. Accordingly, such an enterprise group member participating in a planning proceeding in another State for the purpose of developing a group insolvency solution may still be subject to a main proceeding in the enacting State. The provisions of chapter 2 would be relevant to ensuring cooperation and coordination between the main proceeding and the planning proceeding.

Subparagraph (b)

56. 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 an enterprise group member subject to the jurisdiction of the enacting State. If the law of the enacting State precludes such an enterprise 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)

57. Subparagraph *(c)* recognizes that, as a general principle, in the enterprise group context, it might not always be necessary to commence an insolvency proceeding for every enterprise 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.

58. Non-main 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 proceeding may request the commencement of non-main proceedings when and where that would lead to the efficient administration of the insolvency estate. However, non-main 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 proceeding might be able, at the request of the insolvency representative in the main 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 enterprise group member and other stakeholders are protected (see for example, arts. 27 and 32).

Subparagraph (d)

59. 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 1 bis
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, II, para. 5
A/CN.9/931, para. 76
A/CN.9/WG.V/WP.158, II, paras. 6–7
A/CN.9/937, para. 56
A/CN.9/WG.V/WP.161, II, paras. 7–9
A/CN.9/966, paras. 99–101

Article 5. Competent court or authority

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

60. The competence for the judicial functions addressed in the Model Law may lie with different courts in the enacting State. Enacting States should tailor the text of the article to their 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.

61. 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, II, para. 10
A/CN.9/966, para. 102

Article 6. Public policy exception

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

62. 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 MLCBI and MLIJ. The notion of public policy is grounded in domestic law and may differ from State to State. No uniform definition of that notion is attempted in article 6.

63. 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 domestic 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.

64. 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, such as the security or sovereignty of the State.

65. Cooperation among courts, including through the recognition of a planning proceeding, should not be 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, II, para. 11
A/CN.9/966, para. 103

Article 7. Interpretation

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

66. 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 (Vienna, 1980) [5]). 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 MLCBI and article 8 of MLIJ.

67. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL

[5] United Nations, *Treaty Series, vol.* 1489, No. 25567.

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. 222 below.)

Discussion in UNCITRAL and the Working Group

A/CN.9/937, para. 58
A/CN.9/WG.V/WP.161, II, para. 12
A/CN.9/966, para. 103

Article 8. Additional assistance under other laws

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

68. The purpose of the Model Law is to increase and harmonize the assistance available in the enacting State with respect to enterprise group insolvency. The law of the enacting State may, at the time of enacting the Model Law, already have in place various provisions under which a group representative could obtain assistance. It is not the purpose of the Model Law to replace or displace those provisions to the extent 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 article 8, which specifically refers to assistance to be provided to a group representative by the court or an insolvency representative in the enacting State, is needed to make that point clear.

Discussion in UNCITRAL and the Working Group

A/CN.9/903, paras. 127–129
A/CN.9/WG.V/WP.152, II, para. 46
A/CN.9/931, para. 63
A/CN.9/WG.V/WP.158, II, para. 46
A/CN.9/937, para. 91
A/CN.9/WG.V/WP.161, II, para. 48
A/CN.9/966, paras. 71–72

Chapter 2. Cooperation and coordination

69. As noted above (para. 3), the provisions of MLCBI focus on a single debtor, albeit with assets in different States. For that reason, MLCBI has limited applicability 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 enterprise group is or can be recognized under domestic law, proceedings concerning enterprise 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 domestic courts or be deemed unnecessary because each proceeding is, essentially, a domestic proceeding. While it may be possible in some instances to treat each enterprise group member entirely separately, for many enterprise groups, resolution of the financial difficulty of a number of enterprise group members may be achieved through a more widely-based, potentially group-wide, insolvency solution that reflects the manner in which the enterprise group conducted its business before the onset of insolvency and addresses the future of the enterprise group as a whole or in part. Such an approach may be of particular importance where the business of the enterprise group is conducted in a closely integrated manner.

70. For those reasons, it may be desirable that an insolvency law recognizes the existence of enterprise groups and the need for courts to cooperate with other courts, with insolvency representatives of different enterprise group members and with group representatives, both domestically and cross-border. Accordingly, the drafting of the articles of chapter 2 does not distinguish between local or foreign courts or insolvency representatives (where "foreign" would refer to courts located or insolvency representatives appointed in a State other than the enacting State). Moreover, cooperation would be important not only with respect to insolvency proceedings concerning the same enterprise group member debtor, but also with respect to insolvency proceedings concerning different enterprise group members, especially those that may be taking part in developing a group insolvency solution for the group as a whole or in part.

71. 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 insolvency proceedings involving different enterprise 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). Chapter 2 does not prevent an enacting State from using other tools for cooperation and coordination that might be available domestically; this is reflected in article 8.

72. Chapter 2 draws upon 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 recommendations 240–254) and the Practice Guide (chap. II). As such, those texts serve as background information and should be read in conjunction with articles 9–18 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.

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

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

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

73. Article 9, paragraph 1, requires the court to cooperate to the maximum extent possible with other courts, insolvency representatives and, where appointed in the context of a planning proceeding, a group representative, wherever those courts or representatives might be located. Accordingly, it applies both domestically and in a cross-border context. The Model Law enables the court to cooperate directly with those courts and representatives. At the same time, the Model Law recognizes that such direct cooperation may not always be possible under applicable laws and rules. It therefore provides the flexibility to facilitate that cooperation through any locally appointed insolvency representative or other person appointed by the court, such as a court official, for that specific purpose. 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 that it should act with urgency to avoid potential conflicts, to preserve the value of assets and operations of affected enterprise group members and of the enterprise group as a whole or to address issues considered to be time-sensitive.

74. The focus of article 9 is on the matters referred to in article 1 concerning insolvency proceedings commenced for one or more enterprise group members, i.e., conduct 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 enterprise group members in different States might be key to the resolution of the enterprise 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 enterprise group members, irrespective of whether they are in the same or different jurisdictions.

75. Additional material on coordination and cooperation can be found in the Legislative Guide, part three, chapter III, paragraphs 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, II, para. 8
A/CN.9/WG.V/WP.161, II, paras. 13–14
A/CN.9/966, paras. 18–19

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

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

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

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

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

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

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

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

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

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

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

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

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

76. Article 10, which draws upon recommendation 241 of the Legislative Guide, 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 9. As such it provides guidance on how cooperation "to the maximum extent possible" under article 9 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.

77. Some of the elements of article 10 are discussed in detail in the Legislative Guide, part three, chapter III:

(a) Paragraph 20 – means of communication;

(b) Paragraphs 21–34 – establishing rules or procedures for court-to-court communication (including time, place and manner of communication, notice of proposed communication, right to participate, recording of the communication as part of the record of the proceedings, confidentiality, costs of communication and effect 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 to act at the direction of the court (see also the Practice Guide, chap. II, paras. 2–3). The reference to a "person or body" in subparagraph *(e)* is intended to provide the court with flexibility in accordance with local laws and rules, so that it could appoint, for example, a particular person or a specific office or organization through which the coordination might be conducted (thus including both natural and legal persons).

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

79. As an overarching consideration with respect to coordination, the advantages of enterprise group insolvency 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 enterprise group members.

80. Cross-border insolvencies may give rise to disputes between enterprise group members concerning claims, whether arising within or outside the enterprise 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.

81. 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.

82. In some jurisdictions, an insolvency representative may or must file claims in any jurisdiction in which there is a proceeding involving the same debtor. This is typically done on behalf of all the creditors participating in the proceeding to which that insolvency representative was appointed but subject to certain conditions, including where that course of action will benefit the creditors. Thus, every claim made in any proceeding may be asserted in all proceedings through the insolvency representative, and therefore every claim may share in the distribution in every proceeding. Subparagraph *(j)* permits recognition of cross-filing where it may be used in the enterprise group context as a means of facilitating coordination and cooperation between proceedings with respect to treatment of claims. This would be subject to the usual safeguards to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions (see art. 32 of MLCBI).

83. Subparagraph *(k)* 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. 29 and 31) 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, II, para. 6
A/CN.9/931, para. 80
A/CN.9/WG.V/WP.158, II, para. 8
A/CN.9/WG.V/WP.161, II, para. 15
A/CN.9/966, paras. 20–22

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

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

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

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

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

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

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

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

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

84. Article 11 is based upon recommendation 244 of the Legislative Guide. Where a court communicates with another court, 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 any communication between those 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 insolvency agreements developed in cross-border proceedings.

85. For the avoidance of doubt, paragraph 2 elaborates on the effect of communication under article 9, 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, II, para. 7
A/CN.9/931, para. 81
A/CN.9/WG.V/WP.158, II, para. 8
A/CN.9/937, paras. 60–61
A/CN.9/966, paras. 23–24

Article 12. Coordination of hearings

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

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

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

86. Article 12 is based upon recommendation 245 of the Legislative Guide. (See also the Practice Guide, chapter III, paras. 154–159.)

87. 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 the article.

88. While such hearings may be relatively convenient to organize in a domestic setting, they can be difficult to organize in an international setting, as they may involve different languages, time zones, laws, procedures and judicial traditions. They may result in a deadlock if, for example, the competencies of the courts and officials engaged in the hearing are not precisely agreed or established before the hearing. It is thus generally advisable to agree on procedures before such coordinated hearings are held, including on questions of competence and limitations applicable to any participants, officials or court representatives, as suggested by paragraph 2 of the article.

89. An agreement on the conditions to govern the coordinated hearing might address, for example, the 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 (see e.g., art. 18, para. 4 or art. 21, para. 5); and the rendering of decisions. Once a hearing has been concluded, the relevant officials or representatives may further communicate to assess the content of the hearing, discuss next steps (including the need for additional hearings), develop or modify the agreement 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, II, para. 8
A/CN.9/931, para. 82
A/CN.9/WG.V/WP.158, II, para. 8
A/CN.9/937, para. 59
A/CN.9/966, para. 25

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

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

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

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

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

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

90. Articles 13 and 14 address cooperation and coordination between the various office holders appointed in insolvency proceedings concerning enterprise group members 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 enterprise group member debtors. These articles draw upon recommendations 246–249 of the Legislative Guide. (See also the Practice Guide, chapter III, paras. 160–166.)

91. 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 enterprise 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 insolvency agreements, including in cross-border proceedings, as provided by the Model Law.

92. 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.

Discussion of article 13 in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [15]
A/CN.9/898, para. 67
A/CN.9/WG.V/WP.146, footnote 15
A/CN.9/903, para. 98
A/CN.9/WG.V/WP.152, II, 9
A/CN.9/931, para. 83
A/CN.9/WG.V/WP.158, II, paras. 8 and 9(a)
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, II, paras. 16–20
A/CN.9/966, paras. 26–27

Discussion of article 14 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, II, para. 9
A/CN.9/931, para. 84
A/CN.9/WG.V/WP.158, II, paras. 8 and 9(a)
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, II, para. 21
A/CN.9/966, para. 28

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

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

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

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

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

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

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

93. Article 15 draws upon recommendation 250 of the Legislative Guide and is suggested for use by the enacting State to provide an indicative list of the types of cooperation that are authorized by articles 13 and 14. 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 cooperation, including in a cross-border context, particularly in cases involving enterprise groups, and in States where discretion has traditionally been limited.

94. 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 enterprise 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. It might be noted that subparagraph *(b)* is not intended to refer only to cross-border agreements, but also to include agreements concerning enterprise group insolvency proceedings in the enacting State.

95. Provisions in the Legislative Guide, part three, chapter II, such as those addressing procedural coordination in the domestic context (paras. 22–37 and recommendations 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 enterprise 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/WG.V/WP.158, II, para. 8
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, II, paras. 22–23
A/CN.9/966, paras. 29–31

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

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

96. Article 16 draws upon recommendations 253–254 of the Legislative Guide. It recognizes the desirability of authorizing the relevant parties – insolvency representatives and a group representative where appointed – to conclude agreements concerning the coordination of insolvency proceedings relating to different enterprise group members. Such agreements may be useful for developing and implementing a group insolvency solution. They are analysed and discussed in some

detail in the Practice Guide (chap. III, paras. 48–54). While the Practice Guide focuses on cross-border insolvency agreements, the discussion is relevant also to insolvency agreements concerning proceedings affecting different enterprise group members that are taking place in the enacting State. Different States may have different form requirements that will have to be observed in order for the agreements to be effective. Accordingly, article 16 does not require the agreement to be approved by the court, leaving that issue to domestic law and the decision of the representatives involved.

97. While the insolvency law of certain States may permit courts to approve agreements regarding the same debtor (for example, through provisions analogous to art. 27 of MLCBI), that authorization may not necessarily extend to the use of such agreements in the enterprise group context. What might be required to facilitate the global resolution of an enterprise 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 enterprise 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 16 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, II, para. 10

A/CN.9/931, para. 86

A/CN.9/WG.V/WP.158, II, paras. 8 and 9(b)

A/CN.9/937, para. 63

A/CN.9/WG.V/WP.161, II, paras. 24–25

A/CN.9/966, paras. 32–33

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

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

98. Article 17 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 group members (see chap. II, paras. 142–144, chap. III, paras. 43–47 and recommendations 232 and 251). 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. Article 17 is intended to apply both when multiple proceedings take place in the enacting State, as well as when this happens in a cross-border context.

99. When the same or a single insolvency representative is to be appointed in different jurisdictions in multiple insolvency proceedings affecting members of the same enterprise group, that person (whether natural or legal) would need to meet applicable requirements in the appointing jurisdictions. For example, where a person is appointed in the enacting State and in another State, the appointment in the other State could not diminish that person's obligations under the law of an enacting State (see the Legislative Guide, part three, chap. II, paras. 139–145 with respect to domestic proceedings). Such an appointment has the potential to greatly facilitate cooperation between the different proceedings and the reorganization of the enterprise group as a whole.

100. Although the administration of each of the relevant enterprise 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 enterprise group members, reduce related costs and delays and facilitate the gathering of information on the enterprise 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 enterprise group members are observed.

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

102. The appointment could be of a natural person qualified to act in different jurisdictions 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 jurisdictions.

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

Conflict of interest

104. Where a single or the same insolvency representative is appointed to administer several members of an enterprise 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 enterprise group member with respect to another enterprise group member. The obligation to disclose potential or existing conflicts of interest (as reflected in recommendations 116, 117, 233 and 252 of the Legislative Guide) would be relevant to the enterprise 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 enterprise group members in the event of a conflict of interest, a situation that would render article 17 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, II, para. 26
A/CN.9/966, paras. 34–35

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

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

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

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

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

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

105. Article 18, which applies generally to enterprise group-related insolvency proceedings, is intended to provide an additional tool for cooperation by facilitating the participation of enterprise group members (wherever located) in the main proceeding, as defined in article 2, subparagraph *(j)*, commenced in the enacting State with respect to an enterprise group member having 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 enterprise group member and to take part in negotiations to develop and implement a group insolvency solution, in cases where that is relevant.

Paragraph 2

106. The qualification "subject to paragraph 2" at the beginning of paragraph 1 of article 18 is intended to mean that paragraph 2 contains the only limitation applicable to participation in an insolvency proceeding. Paragraph 2 permits an enterprise group member with COMI in a State other than the enacting State to participate in the proceeding in the enacting State, unless the law or a 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 an enterprise group member to limit such participation.

Paragraph 3

107. Paragraph 3 confirms that the participation referred to in paragraph 1 is entirely voluntary and that an enterprise group member may commence its participation or opt out of it at any time during the course of the proceeding. Its ability to do so may be moderated by the impact of domestic law, such as company law.

Paragraph 4

108. The second sentence of paragraph 4 is based upon article 10 of MLCBI and constitutes a "safe conduct" rule aimed at ensuring that a court in the enacting State would not assume jurisdiction over an enterprise group member on the sole ground that the enterprise 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.

109. The limitation on jurisdiction over the enterprise group member embodied in article 18, paragraph 4, is not absolute. It is only intended to shield the enterprise 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 enterprise group member under the laws of the enacting State are not affected. For example, a tort or misconduct committed by the enterprise group member or its authorized representative may provide grounds for jurisdiction to deal with the consequences of such an action.

110. The limitation in article 18, 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 enterprise group members over the possibility of jurisdiction being exercised on the sole ground of their participation in the main proceeding.

111. The participation referred to in article 18 is intended to apply to all enterprise group members, irrespective of their financial status. Accordingly, it makes no distinction between an enterprise group member that might be subject to insolvency proceedings and an enterprise group member that is not, avoiding any distinction based upon financial status, such as between what might be described as an "insolvent" or "solvent" enterprise group member. The focus of the article is the usefulness or desirability of an enterprise group member participating in such a main proceeding, whether because it has something to contribute to the resolution of the financial difficulty of the enterprise group member subject to that proceeding (e.g., it may own intellectual property that is key to the insolvency solution being developed for the enterprise group) or because it seeks to protect its own interests. Such participation by enterprise 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 the Legislative Guide, recommendation 238). Where the enterprise 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. 18, 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 enterprise 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. Such participation may also give rise to a possible conflict of obligations of directors of enterprise group members as discussed in the Legislative Guide, part four, section two dealing with obligations of directors of enterprise group companies in the period approaching insolvency.

112. The articles addressing relief under the Model Law (art. 20, para. 2; art. 22, para. 4; and art. 24, para. 3) confirm that relief may not be granted in the enacting State against the assets and operations of a participating enterprise 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 20 (see in particular paras. 132–136, 164 and 180 below).

Paragraph 5

113. Where an enterprise group member participates in a proceeding under article 18, paragraph 5 provides that that enterprise group member 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, II, 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, II, paras. 27–28
A/CN.9/966, paras. 36–38

Chapter 3. Appointment of a group representative and relief available in a planning proceeding in this State

114. Chapter 3 of the Model Law addresses the situation where a planning proceeding is taking place in the enacting State, focusing on the 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.

115. 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 the enacting States. Those provisions address joint application for commencement, procedural coordination and, in limited circumstances, substantive consolidation (the Legislative Guide, recommendations 199–210 and 219–231).

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

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

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

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

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

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

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

116. Article 19 indicates that a group representative may be appointed when the proceeding meets the requirements of article 2, subparagraphs *(g)*(i) and (ii) (i.e., one or more enterprise group members in addition to the enterprise group member subject to the main proceeding are participating in that proceeding for the purpose of developing and implementing a group insolvency solution and the enterprise group member subject to that main proceeding is likely to be a necessary and integral participant in that group insolvency solution). What constitutes participation is described in more detail in article 18, paragraph 4. Upon appointment, the group representative's task is to seek to develop a group insolvency solution. To do so, the group representative can seek relief under article 20 and is authorized to act in another State as the foreign representative of the planning proceeding.

117. The group representative appointed to the planning proceeding and the insolvency representative appointed to the main proceeding could be the same person but there is no requirement to that effect in the Model Law. Where they are the same person, provision may need to be made to avoid potential conflicts of interest between the two appointments, as the obligations and responsibilities may overlap (see para. 104 above, and the Legislative Guide, part three, chap. II, para. 144 and recommendation 233, and chap. III, para. 47 and recommendation 252).

118. 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

119. Paragraph 2 specifies that the relief that might be sought by a group representative in the enacting State is the relief available under paragraph 3 of article 19 and article 20 of the Model Law, to distinguish it from the relief that would be available following recognition of a foreign planning proceeding under chapter 4 of the Model Law. As noted in paragraph 41 above, domestic law may need to address other powers of the group representative in the enacting State with respect to domestically commenced planning proceeding.

Paragraph 3

120. Paragraph 3 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.

121. 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 State will be action of the type dealt with in the Model Law. However, the authority given by the enacting State to the group representative to act in a foreign State is not conditional on whether that foreign State has also enacted legislation based on the Model Law.

122. 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 enterprise group members.

123. In addition to the authorization provided by article 19, the group representative can participate, under article 25, in any proceedings relating to enterprise group members in a State recognizing a planning proceeding. Under article 28 or 30, 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, II, 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, II, paras. 29–30
A/CN.9/966, paras. 40–49

Article 20. Relief available to a planning proceeding

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

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

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

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

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

(e) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

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

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

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

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

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

124. Article 20 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. As further set forth in paragraph 174 below, this text does not take a position on whether the consequences of the foreign law are imported into the insolvency system of the enacting State. Given the context in which relief might be sought, the article addresses enterprise 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 enterprise 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 enterprise group member's COMI in another State, as provided by paragraph 3 of the article. In addition, in accordance with article 27, the court, while granting, denying, modifying or terminating any relief, must be satisfied that the interests of creditors and other interested persons are adequately protected. Under article 27, paragraph 2, the court may subject any relief granted under article 20 to any conditions it considers appropriate.

Paragraph 1

Subparagraphs (a) and (b)

125. 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 right to transfer, encumber or otherwise dispose of any assets

of the enterprise group member. The rationale of these provisions is to allow steps to be taken to ensure that the planning proceeding can be conducted in a fair and orderly manner.

126. 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. The setting aside of such transactions could be considered more effective for such purpose than the imposition of criminal or administrative sanctions on the debtor.

Subparagraph (c)

127. Subparagraph *(c)*, by not distinguishing between various kinds of individual action, would also cover actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is additional to other possible limitations existing under domestic 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.[6] 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 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, 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 of the article.

128. 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.

[6] United Nations, *Treaty Series,* vol. 330, No. 4739.

Subparagraphs (d) and (e)

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

Subparagraph (f)

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

Subparagraph (g)

131. The relief available under article 20 might include, as noted in subparagraph *(g)*, approval of the arrangements concerning funding of an enterprise group member, which may include post-commencement finance, as well as 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 enterprise group member will be offset by the benefit to be derived from continuing that funding arrangement, 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 27. The Legislative Guide, part three addresses both post-application finance (chap. II, paras. 47–51) and post-commencement finance in the enterprise group insolvency context (chap. II, paras. 55–74 and recommendations 211–216).

Paragraph 2

132. Paragraph 2 limits the relief available under article 20 to the assets and operations located in the enacting State of enterprise group members participating in the planning proceeding, where those enterprise group members are subject to insolvency proceedings at the time that relief is sought; relief may not be granted in

respect of a participating enterprise group member if it is not subject to an insolvency proceeding, unless the exception contained in paragraph 2 applies. The enterprise 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. 28 and 29). In the latter case, relief may be granted.

133. Paragraph 2 describes enterprise 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 domestic 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.

134. As noted above under article 18 (see para. 111), there may be circumstances in which different levels of participation in a planning proceeding by an enterprise 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. 29). Such participation by those enterprise group members is not, in fact, unusual in practice. That enterprise group member could thus aid the group insolvency solution being developed for other enterprise group members.

135. The decision by such an enterprise 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. 18, 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 (see paras. 36–38 above), 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.

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

Paragraph 3

137. Paragraph 3 pursues the objective of coordinating relief between insolvency proceedings affecting enterprise group members, especially where a group insolvency solution is being developed. Relief might be sought under article 20 with respect to the assets and operations located in the enacting State of an enterprise group member with COMI in another State, where that enterprise 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 enterprise 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, II, paras. 14–24
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, II, paras. 31–35
A/CN.9/966, paras. 50–52

Chapter 4. Recognition of a foreign planning proceeding and relief

138. 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 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. It might be noted that since the definition of "planning proceeding" envisages that such a proceeding may not itself be a main proceeding, albeit related to a main proceeding (art. 2, subpara. *(g)*), caution may need to be exercised in applying the provisions on recognition and relief.

Article 21. Application for recognition of a foreign planning proceeding

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

2. An application for recognition shall be accompanied by:

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

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

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

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

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

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

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

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

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

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

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

Paragraph 1

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

Paragraph 2

141. 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 subparas. *(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.

142. 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 21 makes no provision for the receiving court to embark on a consideration of whether the proceeding that has led to the planning proceeding was correctly commenced under applicable law; provided the requirements of article 21 are met, recognition should follow in accordance with article 23.

143. 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

144. 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 enterprise group member currently 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 enterprise group members participating in the planning proceeding. Subparagraph *(c)* requires the group representative to provide a statement to the effect that the enterprise group member subject to the foreign planning proceeding has COMI in the jurisdiction in which that proceeding is taking place.

145. Subparagraph *(c)* also requires a statement that the foreign planning proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding. That might be possible where, for example, it can be shown that a group insolvency 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 enterprise group members separately.

146. 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 20, 22 and 24, the court needs to be aware of any other proceedings that may be taking place in third States concerning those enterprise group members participating in the planning proceeding. It will also provide the court with an idea of the overall structure of the enterprise group, as well as information on the relationship between enterprise group members subject to the planning proceeding and other enterprise group members, as well as on the enterprise group as a whole. This information may be particularly important in the context of coordination and cooperation.

Paragraph 4

147. Paragraph 4 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraphs 2 and 3 of the article. 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.

Paragraph 5

148. Paragraph 5 is based upon article 10 of MLCBI. See the explanation provided with respect to article 18, paragraph 4, in paragraphs 108–112 above.

Paragraph 6

149. Paragraph 6, based upon article 16, paragraph 2 of MLCBI, dispenses with requirements for legalization. The Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special

way, in particular by legalization. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

150. It follows from article 21, paragraph 6 (according to which the court "is entitled to presume" the authenticity of documents accompanying the application for recognition) that the court retains discretion to decline to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the ability of the court to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g., because in some States they may involve various authorities at different levels).

151. The provision relaxing any requirement of legalization may raise the question of a possible conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 1961[7] adopted under the auspices of the Hague Conference on Private International Law, which provides specific simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures and a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the above-mentioned convention:

> "However, [legalisation] cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting States have abolished or simplified it, or exempt the document itself from legalisation."

152. According to article 3 of the Model Law, if there is a conflict between the Model Law and a treaty or agreement, the treaty or agreement will prevail.

[7] United Nations, *Treaty Series*, vol. 527, No. 7625.

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, II, paras. 25–30
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, II, paras. 36–37
A/CN.9/966, paras. 53–56 and 104

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

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

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

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

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

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

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

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

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

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

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

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

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

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

153. Article 22 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 art. 24, 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 enterprise group member. The opening words of paragraph 1 allude to the urgency of the measures. The relief available under article 22, with the exception of subparagraph 1*(g)*, is not limited to a single enterprise group member and can relate to both the enterprise group member subject to the planning proceeding, as well as to other enterprise group members participating in the planning proceeding under article 18. The relief under subparagraph 1*(g)* is only available with respect to those enterprise group members participating in the planning proceeding.

154. Article 22 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 art. 24), 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 22 is slightly narrower than the relief available under article 24 following recognition.

155. 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.

Paragraph 1

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

157. 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 22, subparagraph 1*(b)*. As noted in paragraph 126 above, although those sanctions may vary from jurisdiction to jurisdiction, their main purpose, from the viewpoint of creditors, would be the same – to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor.

158. Since article 22, subparagraph 1*(d)* repeats article 20, subparagraph 1*(c)*, the same considerations apply (see paras. 127–128 above).

159. 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 enterprise 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 State receiving the application for recognition. 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 contains 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 27, 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 27, paragraph 2, according to which the court may subject the relief it grants to any conditions it considers appropriate.

160. 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 enterprise group's business and activities after commencement of insolvency proceedings may be critical to reorganization and, to a lesser extent liquidation, where the enterprise group or various members of the enterprise 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 enterprise group funding arrangements as they relate to enterprise group members subject to or participating in the planning proceeding and to authorize the continued provision of funding under those arrangements. Article 27 would apply to enable the court to apply any conditions it may deem necessary to protect the interests of creditors and other stakeholders.

161. 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

162. 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 22 is granted. Paragraph 2 is the appropriate place for the enacting State to make provision for such notice.

Paragraph 3

163. Relief available under article 22 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 24, 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

164. Paragraph 4, which is also included in articles 20 and 24, is intended to exclude the assets and operations of those enterprise group members not subject

to insolvency proceedings from the relief provisions of the Model Law, unless the exception in paragraph 4 applies. See the explanation provided in paragraphs 132–136 above.

Paragraph 5

165. Provisions similar to those contained in paragraph 5 are also included in articles 20 and 24 and pursue the objective of coordinating relief between insolvency proceedings affecting enterprise group members, especially where a group insolvency solution is being developed (see para. 137 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, II, paras. 31–38
A/CN.9/931, paras. 56–57
A/CN.9/WG.V/WP.158, II, paras. 18–22 and 26–31
A/CN.9/937, paras. 70, 74, 76 and 79
A/CN.9/WG.V/WP.161, II, paras. 38–39
A/CN.9/966, paras. 57–58

Article 23. Recognition of a foreign planning proceeding

1. A foreign planning proceeding shall be recognized if:

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

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

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

2. An application for recognition of a foreign planning proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of material changes in the status of the foreign planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

166. Article 23 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 23 thus aims to ensure that the recognition process is certain, predictable and expeditious.

167. In deciding whether a foreign planning proceeding should be recognized, the receiving court is limited to the jurisdictional preconditions set out in the definition, which requires a determination that the proceeding is a planning proceeding within the meaning of article 2, subparagraph *(g)*. Article 23 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 21 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 23.

Paragraph 2

168. The ability to obtain early recognition (and the consequential ability to invoke art. 24) 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 flexibility. 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 weeks. Interim relief will be available under article 22, if some order is necessary while the recognition application is pending.

Paragraph 3

169. 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.

170. 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.

171. 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 the article), if an appeal of the decision would be limited to the question of whether the requirements of articles 21 and 23 were observed in deciding to recognize the foreign planning proceeding.

Paragraph 4

172. 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.

173. 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 21. 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 important 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, II, paras. 39–41
A/CN.9/931, paras. 58–59
A/CN.9/WG.V/WP.158, II, paras. 32–33
A/CN.9/937, para. 80
A/CN.9/WG.V/WP.161, II, para. 40
A/CN.9/966, paras. 59–61

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

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

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

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

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

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

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

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

(g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

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

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

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

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

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

174. 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 does not take a position on whether the consequences of the foreign law are imported into the insolvency system of the enacting State or whether the relief in the foreign proceeding includes the relief that will be available under the law of the enacting State.

175. The relief available under article 24 is discretionary in nature and typical of the relief most frequently granted in insolvency proceedings. In accordance with article 27, the court, while granting, denying, modifying or terminating the relief, must be satisfied that the interests of creditors and other interested persons are adequately protected. 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 MLCBI. Article 21 of MLCBI has been interpreted to mean that recognition is the precondition 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.

176. Since subparagraph 1*(e)* is the same as article 20, subparagraph 1*(c)*, the explanation provided in paragraphs 127–128 above would also apply to article 24. 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 enterprise group member.

177. 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 24, subparagraph 1*(c)* (see para. 157 above).

178. 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 27, paragraph 2, which enables the court to subject the relief granted to any conditions it considers appropriate.

Paragraph 2

179. 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 distribute 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 as provided in paragraph 2. Those safeguards include the following: the general statement in article 27, paragraph 1, of the principle of protection of local interests; and article 27, paragraph 2, according to which the court may subject any relief it grants to conditions it considers appropriate.

Paragraph 3

180. Paragraph 3 is also included in articles 20 and 22 and is intended to exclude from the relief provisions of the Model Law the assets and operations of an enterprise group member for which no insolvency proceeding has commenced, unless the exception in paragraph 3 applies. See the explanation provided in paragraphs 132–136 above.

Paragraph 4

181. Provisions similar to those found in paragraph 4 are included also in article 20, paragraph 3 and article 22, paragraph 5 (see para. 137 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, II, paras. 42–43
A/CN.9/931, para. 60
A/CN.9/WG.V/WP.158, II, paras. 18–22 and 34–35
A/CN.9/937, paras. 70, 74, 76 and 79
A/CN.9/WG.V/WP.161, II, paras. 35 and 41
A/CN.9/966, paras. 62–63

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

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

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

182. The purpose of article 25 is to ensure that the group representative, as a consequence of recognition of the foreign planning proceeding, will have standing to participate in any proceeding taking place in the recognizing State with respect to an enterprise group member participating in the planning proceeding. Those proceedings would include insolvency proceedings and individual actions brought by or against the enterprise group member by a third party. In such a situation, where the proceeding concerns insolvency, "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 enterprise group member or cooperation with the planning proceeding. With respect to other types of proceeding, "participation" would provide the necessary standing for the group representative to appear in court and be heard.

183. Under paragraph 2, the court may also approve participation by the group representative in any insolvency proceeding taking place in the enacting State 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 19, subparagraph 3*(c)*, to seek such participation. Such participation might be relevant where, for example, the enterprise group member in question is not permitted to participate in the planning proceeding (e.g., where it is prohibited from doing so under art. 18, 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 enterprise group member, notwithstanding its non-participation, might be relevant to the development of the group insolvency solution.

184. Article 25 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 law of the enacting State that govern the fate of any such motions.

185. 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, II, para. 44
A/CN.9/931, para. 61
A/CN.9/WG.V/WP.158, II, para. 36
A/CN.9/937, para. 83
A/CN.9/WG.V/WP.161, II, paras. 42–43
A/CN.9/966, paras. 64–67

Article 26. Approval of a group insolvency solution

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

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

186. 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 enterprise group as a whole or in part, the relevant portion of the group insolvency solution should be approved locally with respect to affected individual enterprise group members, in the State in which each affected enterprise group

member has a COMI or an establishment, in accordance with the laws of that State. It might be noted that recognition of the foreign planning proceeding in which the group insolvency solution was developed is not a precondition for approval of the relevant part of the group insolvency solution.

187. Article 26 does not address the procedure for seeking approval of the group insolvency 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 relevant portion of the group insolvency solution should have effect in that State. Where the group insolvency solution affects or modifies an enterprise group member's interests, it may be helpful to the approving court to consider the group insolvency solution in its entirety, rather than only the portion affecting the particular enterprise group member. That approach would provide the court with the overall context for resolving the enterprise group's financial difficulties of which the particular enterprise group member 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 article 29 or 31.

Paragraph 2

188. Paragraph 2 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 insolvency solution and to be heard on any issues that might be relevant to approval of the relevant portion of the group insolvency 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, II, paras. 46–49
A/CN.9/931, paras. 63–64
A/CN.9/WG.V/WP.158, II, paras. 41–47
A/CN.9/937, paras. 85–91
A/CN.9/WG.V/WP.161, II, paras. 47–48
A/CN.9/966, paras. 71–72

Chapter 5. Protection of creditors and other interested persons

Article 27. Protection of creditors and other interested persons

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

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

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

189. The idea underlying article 27, which draws upon article 22 of MLCBI, is that there should be a balance between relief available under the Model Law and the protection of interests of the persons (natural and legal) that may be affected by such relief. In addition to the enterprise group member subject to the relief, such persons could include other enterprise group members participating in the planning proceeding, creditors of participating enterprise group members and other stakeholders. This balance is essential to achieving the objectives of cross-border insolvency legislation and ensuring adequate protection of the interests of those mentioned above. Paragraph 1 makes it clear that the reference to creditors is to the creditors of those enterprise 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 enterprise group members not involved in the planning proceeding.

190. The reference to the interests of creditors and other interested parties in article 27, paragraph 1, provides useful elements to guide the court in exercising its powers under the Model Law, particularly articles 20, 22 and 24 (but also arts. 29 and 31). In order to tailor the relief appropriately to provide adequate protection, the court is clearly authorized, under article 27, paragraph 2, to subject the relief to conditions and, under article 27, 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 27 is intended to operate in the context of the procedural system of the enacting State.

191. In many cases, the affected creditors will be "local" creditors. Nevertheless, in enacting article 27, 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 treated fairly and as far as possible be accorded the same treatment.

192. Protection of all interested persons is linked to provisions in domestic 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. Domestic 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, II, para. 45
A/CN.9/931, para. 62
A/CN.9/WG.V/WP.158, II, paras. 37–40
A/CN.9/937, para. 84
A/CN.9/WG.V/WP.161, II, paras. 44–46
A/CN.9/966, paras. 68–70

Chapter 6. Treatment of foreign claims

193. 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 receive 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 enterprise group member commences in one State and that enterprise group member has creditors in another State, the claims of those creditors could be addressed in the first State in accordance with the treatment they would receive under the relevant applicable law if a non-main proceeding were to commence in the second State. The use of the word "treatment" refers to the status of the claim and the manner in which it would be handled under the applicable law; if, for example, the claim is for unpaid wages, it would have the same priority and the same statutory conditions as to amount, if any, that may be applicable under the relevant law.

194. The treatment to be accorded to the foreign claims where these measures are used 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.

195. For the purposes of article 28, 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 domestic 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.

196. 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 insolvency cases where a group insolvency solution was being devised or pursued in a main proceeding for multiple enterprise group members (which may have commenced in a single jurisdiction) and the commencement of non-main proceedings for any of those enterprise group members in another jurisdiction would have adversely affected the achievement of that group insolvency solution. Although

typically used in an enterprise group insolvency context, these measures have also been applied in respect of individual debtors.

197. 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 obstructions caused by the removal of part of the assets of the debtor from the control of the insolvency representative of the main proceeding.

198. There may be situations in which the use of such measures may be limited. For example, 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 to the main proceeding.

199. Certain safeguards should be associated with 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 commenced, may assist in achieving creditor protection.

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

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

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

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

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

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

200. Article 28 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 these provisions is to minimize the commencement of non-main proceedings in that second State and to facilitate the centralized treatment of claims in an enterprise group insolvency.

201. The measures referred to in article 28 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 preconditions for such a proceeding do not exist.

202. Although the use of these measures in practice is typical in situations where the main and non-main proceedings relate to the same enterprise group member, the drafting of the provision does not preclude application of the provision in situation in which those proceedings relate to different enterprise 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 an enterprise group member that is subject to a main proceeding in the enacting State could be treated in that main proceeding in accordance with the treatment it would be accorded in a non-main proceeding; and *(b)* a claim that could be brought in a non-main proceeding in one State relating to an enterprise group member that is participating in a planning proceeding in the enacting State could be treated in the planning proceeding in accordance with the treatment it would be accorded in a non-main proceeding. Application in the second scenario would seem to be a logical extension of the provisions permitting such participation provided the law or a court in the State where the non-main proceeding could be brought does not prevent it (art. 18, para. 2).

203. 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, 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 28, 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.

204. 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.

205. Where the insolvency representative and the group representative are the same person, provisions addressing potential conflict of interest would become relevant (see para. 104 above).

206. The Model Law does not address either the legal consequences for affected creditors or 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.

207. For the undertaking to become enforceable and binding on the insolvency estate of the main proceeding, 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 claims pursuant to that undertaking. The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required. The undertaking given under article 28 enables a court in the other State to decline to commence a non-main proceeding, pursuant to article 29, subparagraph *(b)*.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [52]–[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, II, paras. 50–54
A/CN.9/931, paras. 45–47
A/CN.9/WG.V/WP.158, II, para. 48
A/CN.9/937, paras. 76 and 92–96
A/CN.9/WG.V/WP.161, II, para. 49
A/CN.9/966, paras. 73–74

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

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

(a) Approve the treatment to be provided in the foreign main proceeding to the claims that might otherwise be brought in a non-main proceeding in this State; and

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

208. As stated above (para. 58), non-main proceedings can serve different purposes and have advantages and disadvantages. Article 29 enables (but does not require) the court of the enacting State, which is the State in which the claim could have been brought but for undertaking given under article 28, 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. The court's powers are discretionary under this article. For example, it may exercise its authority under subparagraph *(a)*, *(b)*, or both. The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required.

209. Article 27 would apply and the court should be satisfied that the interests of the creditors and other interested persons, including the enterprise group member(s) subject to the relief to be granted, are adequately protected (see para. 189). 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 main proceedings, 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 main proceedings and the development and implementation of a global group insolvency solution.

210. Recognition of the foreign main proceeding is not a requirement for a court to take the action contemplated by article 29, and the other relief provisions of the Model Law therefore do not apply (unless art. 32, which is a supplemental provision, is also enacted – see below in paras. 217–220). As noted above, the use of this article and article 28 is not limited to the situation in which there is a planning proceeding and may thus apply in the enterprise group insolvency 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 [52]–[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, II, paras. 55–56
A/CN.9/931, para. 48
A/CN.9/WG.V/WP.158, II, para. 49
A/CN.9/937, para. 97
A/CN.9/966, para. 75

Part B. Supplemental provisions

211. Articles 30, 31 and 32 are supplemental provisions that a State may wish to enact. They take the core provisions in part A, chapter 6, a step further. Article 30 permits the use of the measures described in articles 28 and 29 in a proceeding taking place in the enacting State with respect to an enterprise 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 31 and, under article 32, 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 32, paragraph 2, the portion of a group insolvency solution relating to a local enterprise group member, provided it determines that creditors are or will be adequately protected under the group insolvency 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 enterprise group members, including where a group insolvency solution is contemplated.

212. Use of the supplemental provisions might result, however, in an enterprise 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 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 29.

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

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

213. Article 30 expands upon the concept introduced in article 28, permitting treatment of a foreign claim in a main proceeding in the enacting State even if that claim is a claim that could be brought by a creditor in a main proceeding in another State.

214. The undertaking under article 30 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 enterprise group members based in different States, whether or not a group insolvency solution is ultimately developed), or by a group representative appointed in a planning proceeding in the enacting State.

215. As is the case under article 28, 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. 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. The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required. The undertaking given under article 30 enables a court in the other State to decline to commence a main proceeding, pursuant to article 31, subparagraph *(b)*.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [52]–[55]
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, II, para. 57
A/CN.9/931, paras. 49–50
A/CN.9/WG.V/WP.158, II, paras. 50–52

A/CN.9/937, paras. 76 and 98
A/CN.9/WG.V/WP.161, II, para. 50
A/CN.9/966, paras. 76–81

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

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

(a) Approve the treatment in the foreign insolvency proceeding of the claims that might otherwise be brought in a proceeding in this State; and

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

216. Like article 29, article 31 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 30 in another State. Unlike article 30, 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 27, that the interests of the creditors and other interested persons, including the enterprise group member(s) in respect of which the claims could otherwise be brought, are adequately protected (see para. 189). The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [52]–[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, II, paras. 58–59
A/CN.9/931, para. 51
A/CN.9/WG.V/WP.158, II, para. 53
A/CN.9/937, para. 99
A/CN.9/WG.V/WP.161, II, para. 51
A/CN.9/966, paras. 76–79 and 82

Article 32. Additional relief

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

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

217. The additional relief available under article 32 will only apply if a State decides to enact the supplemental provisions. Since application of article 32, paragraph 1 requires recognition of a planning proceeding, it provides relief that is additional to that available under article 24 of the Model Law.

218. 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 an enterprise group member participating in that planning proceeding, provided it is satisfied that the interests of creditors of that participating enterprise group member are or will be adequately protected in the planning proceeding. As such, article 32 is broader than articles 29 and 31 because the court's decision is not based upon an undertaking of the kind referred to in article 28 or 30, but rather on the court satisfying itself that adequate protection is or will be provided in the planning proceeding.

219. Where the court decides not to commence a proceeding under paragraph 1, relief under article 24 would still be available because the enterprise group member, while not subject to an insolvency proceeding, would fall within the terms of the exception in article 24, paragraph 3, i.e., the proceeding was not commenced for the purpose of minimizing the commencement of proceedings in accordance with the Model Law.

220. 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 group insolvency solution if it is satisfied that the interests of creditors of affected enterprise group members are or will be adequately protected in the group insolvency solution. The provision also specifies that the court may grant any relief available under article 24 that might be necessary for implementation of the group insolvency

solution. Without that specific authorization, relief under article 24 is only available following recognition of a planning proceeding, which is not a precondition for the operation of article 32, paragraph 2.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [52] and [55]–[57]
A/CN.9/898, para. 108
A/CN.9/WG.V/WP.146, footnotes 52–53
A/CN.9/903, para. 138
A/CN.9/WG.V/WP.152, II, para. 60
A/CN.9/931, para. 52
A/CN.9/WG.V/WP.158, II, paras. 18–22 and 54
A/CN.9/937, paras. 100–103
A/CN.9/WG.V/WP.161, II, para. 52
A/CN.9/966, paras. 76–79 and 83

VI. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

221. 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: uncitral.un.org).

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

222. 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.

Annex I

General Assembly resolution 74/184 of 18 December 2019

Model Law on Enterprise Group Insolvency of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as of fostering entrepreneurial activity and preserving employment,

Noting the significance of enterprise groups, whether formed domestically or internationally, to international trade and commerce in an increasingly globalized world economy,

Recognizing that, where the business of an enterprise group fails, it is important not only to know how the group will be treated in insolvency proceedings, but also to ensure that such treatment facilitates, rather than hinders, the fast and efficient conduct of the insolvency proceedings,

Aware that very few States, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency, including effective mechanisms for coordination and cooperation in cases of insolvency involving enterprise groups, the development

of a group insolvency solution and the cross-border recognition and implementation of that solution in multiple States,

Recalling its resolution 52/158 of 15 December 1997, in which it expressed its appreciation to the Commission for the adoption of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law,[1] which deals with cross-border coordination, cooperation and recognition in relation to insolvency proceedings concerning a single debtor, and its resolution 65/24 of 6 December 2010, in which it expressed its appreciation to the Commission for the adoption of part three of the *Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law,*[2] which deals with the treatment of enterprise groups in insolvency,[3]

Recognizing the need for a generally acceptable model law that would focus on insolvency proceedings relating to multiple debtors that are members of the same enterprise group, thereby extending the provisions of the Model Law on Cross-Border Insolvency and part three of the *Legislative Guide on Insolvency Law,*

Convinced that the Model Law on Enterprise Group Insolvency,[4] adopted by the Commission at its fifty-second session, fulfils that need and is expected to contribute to the establishment of fair and internationally harmonized legislation on enterprise group insolvency that respects national procedural and judicial systems,

Convinced also that the Model Law on Enterprise Group Insolvency provides for the fair and efficient administration of enterprise group insolvencies, the protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole, the facilitation of the rescue of financially troubled enterprise groups and the adequate protection of creditors and other interested persons, including debtors,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for finalizing and adopting the Model Law on Enterprise Group Insolvency[4] and its guide to enactment;

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with its guide to enactment, to Governments and interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency, bearing in mind the need for internationally harmonized legislation governing and facilitating instances

[1] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), annex I.

[2] United Nations publication, Sales No. E.12.V.16.

[3] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), chap. V.

[4] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), chap. VI, sect. A, and annex II.

of enterprise groups in insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States, when revising or adopting legislation on enterprise group insolvency, also make use of part three of the *Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law,*[2] on the treatment of enterprise groups in insolvency,[3] as well as part four of the *Legislative Guide,*[5] addressing the obligations of directors of an enterprise in the period approaching the insolvency of that enterprise,[6] whose additional section,[7] adopted at the fifty-second session of the Commission, addresses the obligations of directors of enterprise group companies;

5. *Further recommends* that all States continue to consider the implementation of the Model Law on Cross-Border Insolvency[1] and of the Model Law on Recognition and Enforcement of Insolvency-related Judgments, both of the Commission;[8]

6. *Requests* the Secretariat to ensure close cooperation and coordination with international organizations active in the field of insolvency law reform to ensure the consistency and alignment of that work with all texts of the Commission in the area of insolvency law, including the Model Law on Enterprise Group Insolvency, the Model Law on Recognition and Enforcement of Insolvency-related Judgments and part four of the *Legislative Guide on Insolvency Law,* as amended by the Commission at its fifty-second session.

[5] United Nations publication, Sales No. E.13.V.10.

[6] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. V, sect. B.

[7] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), chap. VI, sect. B.

[8] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), annex III.

Annex II

Decision of the United Nations Commission on International Trade Law

At its 1099th meeting, on 15 July 2019, after consideration of the text of the draft model law and the draft guide to enactment, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Assembly established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as of fostering entrepreneurial activity and preserving employment,

Noting the significance of enterprise groups, whether formed domestically or internationally, to international trade and commerce in an increasingly globalized world economy,

Recognizing that, where the business of an enterprise group fails, it is important not only to know how the enterprise group will be treated in insolvency proceedings, but also to ensure that such treatment facilitates, rather than hinders, the fast and efficient conduct of the insolvency proceedings,

Being aware that very few States, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency, including effective mechanisms for coordination and cooperation in cases of insolvency involving enterprise groups, the development of a group insolvency solution and cross-border recognition and implementation of that solution in multiple States,

Recalling the adoption of the UNCITRAL Model Law on Cross-Border Insolvency[1] which deals with cross-border coordination, cooperation and recognition in relation to insolvency proceedings concerning a single debtor, and part three of the UNCITRAL Legislative Guide on Insolvency Law (2010)[2] which deals with the treatment of enterprise groups in insolvency,

Recalling also the mandate given to Working Group V (Insolvency Law) to continue work on insolvency of enterprise groups with the aim of developing a set of model legislative provisions or a model law focusing on insolvency proceedings relating to multiple debtors that are members of the same enterprise group,[3] thereby extending the provisions of the Model Law on Cross-Border Insolvency and part three of the Legislative Guide on Insolvency Law,

Expressing its appreciation to Working Group V for the preparation of a draft model law on enterprise group insolvency and its draft guide to enactment, which provide for the fair and efficient administration of enterprise group insolvencies, the protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole, the facilitation of rescue of financially troubled enterprise groups and the adequate protection of creditors and other interested persons, including debtors,

Appreciating the participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in that work,

Drawing attention to the fact that the text of the draft model law approved by Working Group V at its fifty-fourth session (A/CN.9/966, annex) was circulated for comments before the fifty-second session of the Commission to all States and to organizations invited to attend the sessions of Working Group V as observers, and the comments received were taken into account by the Commission in finalizing the draft model law,

Convinced that a model law on enterprise group insolvency adopted on the basis of the draft model law prepared by the Working Group (A/CN.9/972, annex) will be generally acceptable to States and will contribute to the establishment of fair and internationally harmonized legislation on enterprise group insolvency that respects national procedural and judicial systems,

1. *Adopts* the UNCITRAL Model Law on Enterprise Group Insolvency as contained in annex II to the report of the fifty-second session of the Commission,[4] and its Guide to Enactment, contained in document A/CN.9/WG.V/WP.165,

[1] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), para. 221.

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 233.

[3] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

[4] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), annex II.

as amended by Working Group V (Insolvency law) at its fifty-fifth session (A/CN.9/972, paras. 13 and 14 *(c)*);

2. *Requests* the Secretary-General to publish, including electronically, the Model Law and its Guide to Enactment in the six official languages of the United Nations and to disseminate them broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States, when revising or adopting legislation on enterprise group insolvency, also make use of part three of the UNCITRAL Legislative Guide on Insolvency Law (2010),[2] which deals with the treatment of enterprise groups in insolvency, and part four of the UNCITRAL Legislative Guide on Insolvency Law (2013),[5] which deals with directors' obligations in the period approaching insolvency, and whose additional section, adopted at the fifty-second session of the Commission,[6] addresses obligations of directors of enterprise group companies;

5. *Further recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency (1997)[7] and of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018);[8]

6. *Requests* the Secretariat to ensure close cooperation and coordination with international organizations active in the field of insolvency law reform to ensure consistency and alignment of that work with all UNCITRAL texts in the area of insolvency law, including the Model Law on Enterprise Group Insolvency (2019), the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) and part four of the Legislative Guide on Insolvency Law (2013) as amended by the Commission at its fifty-second session.

[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 204.

[6] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 116.

[7] General Assembly resolution 52/158, annex.

[8] General Assembly resolution 73/200 and *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), annex III.

ISBN 978-92-1-130400-8

V.19-11346