



# General Assembly

Distr.: Limited  
28 September 2015

Original: English

**United Nations Commission on  
International Trade Law  
Working Group V (Insolvency Law)  
Forty-eighth session  
Vienna, 14-18 December 2015**

## **Insolvency Law**

### **Facilitating the cross-border insolvency of multinational enterprise groups: key principles**

**Note by the Secretariat**

#### **Contents**

	<i>Paragraphs</i>	<i>Page</i>
Introduction .....	1-2	2
I. Key principles of regime to address insolvency in the context of enterprise groups. ....	3-14	2



## Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups<sup>1</sup> by developing provisions on a number of issues that would extend the existing articles of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed. The Working Group considered this topic at its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2014) sessions.

2. This note sets forth a number of basic principles that might be helpful to the Working Group in structuring its discussion of the topic and considering how it should progress. These principles establish possible building blocks for a draft text with annotations explaining each principle and providing further information.

## I. Key principles of regime to address insolvency in the context of enterprise groups

### Background

3. In the group context, it may be desirable in order to resolve group financial difficulties to develop a coordinated insolvency solution encompassing some or all group members, the common purpose of which would be the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the members of the enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those members of the enterprise group participating in the group solution. A group solution should be a flexible concept that may be achieved in different ways, depending on the circumstances of the specific group, its structure, business model, degree and type of integration between group members, incidence of financial difficulty in the enterprise group and so forth. It may involve several different approaches for different parts of an enterprise group, such as a combination of liquidation and reorganization proceedings, but may not require proceedings to be commenced for all participating group members; there may be other ways of dealing with creditor claims (see below).

---

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 326.

### Principle 1

**If required or requested to address the insolvency of an enterprise group member, insolvency proceedings may be commenced. When proceedings are not required or requested, there is no obligation to commence such proceedings.**

4. This principle recognizes that in the group context, it might not always be necessary to commence proceedings for every group member, but that commencement of proceedings should not be restricted where they are required or requested. It does not address the status of those proceedings i.e. main or non-main, or the place in which such proceedings might be commenced, but those points might be further elaborated in the text.

5. As noted in the recast EC Insolvency Regulation 1346/2000 (Regulation (EU) 2015/848 of the European Parliament and of the Council)<sup>2</sup> (the recast EIR) non-main insolvency proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the commencement of proceedings to the other States where the assets are located. For that reason, the insolvency representative in the main insolvency proceedings may request the commencement of non-main insolvency proceedings where the efficient administration of the insolvency estate so requires. However, non-main insolvency proceedings may hamper the efficient administration of the insolvency estate, especially in the group context where there might be numerous non-main proceedings. Therefore, there may be situations in which the court seized of a request to commence non-main insolvency proceedings might be able, at the request of the insolvency representative in the main insolvency proceedings, to postpone or refuse the commencement of such proceedings to preserve the efficiency of the main proceedings, provided the interests of creditors and other stakeholders are protected (see for example, the recast EIR, article 36).

### Principle 2

**When it is proposed that an enterprise group solution be developed for some or all of the members of an enterprise group, that solution will require coordination as between group members and may be developed through a coordinating proceeding.**

6. Coordination of the various proceedings may be required to achieve a group solution. There may be several ways of achieving the desired level of coordination. One approach may be to identify one of the insolvency proceedings already commenced with respect to a group member as a coordination proceeding to provide a focal point for leading the coordination and cooperation between those group members involved in negotiating and developing the group solution. Where proceedings for more than one group member are commenced in the same jurisdiction (e.g. because multiple group members have their centre of main

<sup>2</sup> Adopted by the Council on 12 March 2015, available from: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.141.01.0019.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0019.01.ENG); Recitals 40-41 (last visited 21/09/2015).

interests (COMI) in that jurisdiction), that jurisdiction may provide a natural coordination point.

7. It might be noted that the Working Group has previously recognized, in the context of part three of the Legislative Guide, the value of one entity taking a lead role in cooperation (see A/CN.9/WG.V/WP.114, paras. 10-12). That issue was subsequently addressed in the final version of recommendation 250, which provides that the means of cooperation between insolvency representatives may include one of them taking a coordinating role.

8. Another approach might be that taken by the recast EIR, which makes provision for the commencement of group coordination proceedings. These voluntary proceedings are additional to the separate insolvency proceedings commenced for individual group members and can be requested by an insolvency representative appointed in any of the group member proceedings. The request should specify the essential elements of the coordination, in particular an outline of the coordination plan, a proposal as to who should be appointed as a coordinator and an outline of the estimated costs of the coordination (art. 61.3). Recital 57 of the recast EIR provides that group coordination proceedings should always strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. The court requested to commence such proceedings should make an assessment of those criteria prior to opening group coordination proceedings and has to be satisfied that the proceedings are appropriate and that no creditor is financially disadvantaged (art. 63). The recast EIR sets out in some detail the manner in which coordination proceedings will operate.<sup>3</sup>

### **Principle 3**

**Adopting the approach of recommendation 250, enterprise group members might designate one of the insolvency proceedings commenced (or to be commenced) with respect to group members participating in the group solution to function as the coordinating proceeding, the role of which would be procedural, rather than substantive. A proviso might be that the coordinating proceeding should be a proceeding taking place in a State that is the COMI of at least one of the group members that is a necessary and integral part of the enterprise group solution.**

9. Issues relevant to the designation of a coordinating proceeding might include: the criteria for identifying the coordinating proceeding, by whom the identification should be made and the means of reaching agreement on identification; recognition of that agreement in all relevant States; identification of the role to be played by the coordinating proceeding; and whether coordination should be initiated and led by the court responsible for conduct of the coordinating proceeding or by the relevant insolvency representative.

---

<sup>3</sup> Recast EIR, articles 61-77.

#### **Principle 4**

**1. The court located in the COMI (the COMI court) of an enterprise group member participating in a group solution can authorize the insolvency representative appointed in insolvency proceedings taking place in the COMI to seek: (i) to participate and be heard in a coordinating proceeding taking place in another jurisdiction, and (ii) recognition by the coordinating court of the proceeding in the COMI jurisdiction; and**

**2. The coordinating court can receive such a request for recognition.**

10. Where a coordinating proceeding is taking place in one State, an insolvency representative appointed in related proceedings (i.e. concerning another group member) in a different State may need authorization to participate in the coordination proceedings and to be able to seek recognition of those proceedings, consistent with article 5 of the Model Law and recommendation 239 of part three of the Legislative Guide. The coordinating court may also need appropriate authorization to receive such applications.

#### **Principle 5**

**Participation in the coordination process would be voluntary for those group members whose COMI is located in a jurisdiction different to that of the coordinating proceeding. For those group members whose COMI is located in the same jurisdiction as the coordinating proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply. Solvent members of the enterprise group may participate in a coordination process without such participation implying a submission to the jurisdiction of a domestic or foreign insolvency court or to the applicability of domestic or foreign insolvency laws.**

11. The coordination process is intended to be entirely voluntary for all relevant group members. Those members not seeking to participate could be reorganized or liquidated individually. Participation of solvent group members is in keeping with the recognition in part three of the Legislative Guide that such participation may be a necessary part of a financial solution for an enterprise group and is thus based upon recommendation 238.

#### **Principle 6**

**Creditors and stakeholders of each enterprise group member participating in the group solution would vote in their own jurisdiction on the treatment they are to receive under the group reorganization plan according to the applicable domestic law.**

12. This principle preserves the rights of creditors and other stakeholders to vote on the specific treatment they are to be accorded under the group plan, in accordance with the relevant applicable law. A coordinated group plan may comprise a number of parts applicable to different group members and, accordingly, approval would occur member by member with respect to the part applying to each member. If, under the law applicable in each member's jurisdiction, only creditors whose rights are affected by a plan are required to vote on it, then only those creditors would vote. That law would also apply to the voting mechanism, including

use of classes, and the majorities required for approval. To approve a plan across multiple group members, a number of issues may need to be considered, including applicable majorities across group members, what is to happen to group members that do not approve the plan and so forth.

**Principle 7**

**Following approval of the group reorganization plan by relevant creditors and stakeholders, each COMI court would have jurisdiction to deal with the group reorganization plan in accordance with domestic law.**

13. In addition to the approval process, national law would apply to confirmation and implementation of the reorganization plan.

**Principle 8**

**The insolvency representative appointed in the proceeding designated as the coordinating proceeding should have a right of access to the proceedings in each COMI court to be heard on issues related to implementation of the group reorganization plan.**

14. This principle builds upon recommendation 239 and the coordination and cooperation recommendations 240-242 and 246 of part three of the Legislative Guide.