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## Insolvency Law

### **Facilitating the cross-border insolvency of multinational enterprise groups: compilation of principles and draft articles**

**Note by the Secretariat**

#### Contents

	<i>Page</i>
I. Introduction . . . . .	3
II. Draft legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups . . . . .	3
Chapter 1. General provisions . . . . .	3
Article 1. Scope . . . . .	3
Principle 1 bis. . . . .	3
Principle 1. . . . .	3
Article 2. Definitions . . . . .	4
Chapter 2. Cooperation and coordination . . . . .	6
Article 9. Cooperation and direct communication between a court of this State and foreign courts or group representatives . . . . .	6
Article 10. Cooperation to the maximum extent possible under article 9 . . . . .	6
Article 12. Effect of communication under article 9 . . . . .	7



Article 13. Coordination of hearings . . . . .	7
Article 14. Cooperation and direct communication between [group representatives] and foreign courts . . . . .	7
Article 15. Cooperation to the maximum extent possible under article 14 . . . . .	8
Article 17. Authority to enter into agreements concerning the coordination of proceedings . . . . .	8
Article 18. Appointment of a single [or the same] insolvency representative . . . . .	8
Chapter 3. Facilitating the development and recognition of a group insolvency solution . . . .	9
A. Provisions relevant to a State in which a planning proceeding commences (i.e. State A concerning debtors 1 and 2) . . . . .	9
Article B. Participation by enterprise group members in an insolvency proceeding in this State; appointment of a group representative . . . . .	9
Principle 4, paragraph 2 . . . . .	10
Principle 5, sentence 2 . . . . .	10
Article D. Relief available to a planning proceeding in this State . . . . .	10
B. Provisions relevant to a State in which recognition of a planning proceeding is sought .	11
Article 3. Recognition of a planning proceeding . . . . .	11
Principle 4, paragraph 1 . . . . .	12
Article 6. Relief that may be granted upon application for recognition of a foreign proceeding . . . . .	12
Article 5. Decision to recognize a planning proceeding . . . . .	13
Article 7. Relief that may be granted upon recognition of a planning proceeding . . . . .	14
Article D. Participation of a group representative in a proceeding in this State . . . . .	15
Article 8. Protection of creditors and other interested persons . . . . .	15
Article E. Approval of local elements of a group insolvency solution . . . . .	16
Principle 8 . . . . .	16
Chapter 4. Treatment of foreign claims in accordance with applicable law . . . . .	17
Article F. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings . . . . .	17
Chapter 5. Supplemental provisions . . . . .	17
Article G. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings . . . . .	17
Article H. Additional relief . . . . .	18

## **I. Introduction**

1. The provisions set out below are arranged in accordance with the structure agreed at the forty-eighth session (A/CN.9/864, para. 18). There is some overlap between the content of the three texts that are merged below, but the original numbering of each article or principle is retained to indicate the origin of each provision; renumbering can be undertaken at a later stage. Where more than one article addresses the same issue they have been merged, while principles that are reflected in the content of articles appear in footnotes to those articles. Principles that address issues not covered by the articles are included in the text; the Working Group may wish to consider whether the substance of those principles should be reflected in draft legislative provisions. The drafting of the principles and the numbered articles has been revised to ensure consistent use of terminology such as “planning proceeding”, rather than “coordinating proceeding”.

## **II. Draft legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups**

### **Chapter 1. General provisions**

**Article 1. Scope** [*to be drafted*]<sup>1</sup>

**Principle 1 bis**<sup>2</sup>

The principles that follow are each subject to two fundamental underpinning principles:

(a) The jurisdiction of the courts in the State in which the centre of main interests (COMI) of an enterprise group member is located remains unaffected; and

(b) The principles do not replace or interfere with any process or procedure (including any permission, consent or approval) required by the jurisdiction in which the COMI of an enterprise group member is located, in respect of that enterprise group member’s participation [to any extent] in a group insolvency solution.

**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.

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<sup>1</sup> The material contained in the paragraphs 3 and 4 of the Introduction in A/CN.9/WG.V/WP.137 could be included in the scope provision.

<sup>2</sup> Principle 1bis is taken from A/CN.9/864, para. 14.

## Article 2. Definitions<sup>3</sup>

For the purposes of these provisions:

(a) “Enterprise” means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;<sup>4</sup>

(b) “Enterprise group” means two or more enterprises that are interconnected by control or significant ownership;<sup>5</sup>

(c) “Control” means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;<sup>6</sup>

(d) “Enterprise group member” means

*Variant 1:* [an enterprise referred to in subparagraph (a)];<sup>7</sup>

*Variant 2:* [an enterprise that has a separate legal identity and that is interconnected, by control or significant ownership, with one or more other enterprises];<sup>8</sup>

(e) “Group Representative” means

*Variant 1:* a person or body, [including one appointed on an interim basis], authorized to act as a representative of a proceeding commenced in this State in respect of an enterprise group member whose centre of main interests is located in this State and in which other group members are participating for the purpose of developing a group insolvency solution;<sup>9</sup>

*Variant 2:* [a person or body who is appointed pursuant to article B, paragraph 3 and who is responsible for seeking to develop a group insolvency solution];<sup>10</sup>

<sup>3</sup> The variants set forth below are suggested as a means of simplifying and clarifying the drafting of the various proposals that have been made. They are not intended to introduce new material for consideration.

<sup>4</sup> Use of this definition from the Legislative Guide, part three was agreed by the Working Group at its forty-fifth session (A/CN.9/803, para. 16). This definition and the definitions of “enterprise group” and “control” are included for the information of the Working Group; if not required in this text, they can be deleted at a later stage.

<sup>5</sup> Use of this definition from the Legislative Guide, part three was agreed by the Working Group at its forty-fifth session (A/CN.9/803, para. 16).

<sup>6</sup> This definition is found in the Legislative Guide, part three, glossary, para. 4(c).

<sup>7</sup> Variant 1 of subpara. (d) is taken from A/CN.9/WG.V/WP.128.

<sup>8</sup> Variant 2 of subpara. (d) is taken from Art. A, para. 1 as set forth in A/CN.9/864, para. 39. This variant repeats elements of the definitions of “enterprise” and “enterprise group” as those terms appear in part three of the Legislative Guide, which are included at subparas. (a) and (b). This definition might thus be revised in accordance with variant 1 or as “an enterprise that is a member of an enterprise group”.

<sup>9</sup> Variant 1 of subpara. (e) is taken from A/CN.9/WG.V/WP.134.

<sup>10</sup> Variant 2 of subpara. (e) is taken from Art. A, para. 2 as set forth in A/CN.9/864, para. 39. This person need not necessarily be authorized to administer the assets etc. of the debtors with their COMI in the commencing State and an insolvency representative (IR) may be appointed in those proceedings.

(f) “Group insolvency solution” means

*Variant 1:* [a set of proposals adopted in a planning proceeding:

(a) For the reorganization, sale, or liquidation of some or all of the operations or assets of more than one group member;

(b) That would be likely to add to the overall combined value of the group members involved; and

(c) That must be approved, insofar as the proposals relate to a particular group member, in the jurisdiction in which that group member has its centre of main interests];<sup>11</sup>

*Variant 2:* [a proposal or set of proposals developed in a planning proceeding to enhance the overall combined value of two or more enterprise group members through the reorganization, sale, or liquidation of some or all of the operations or assets of those group members.]<sup>12</sup>

(g) “Planning proceeding” means

*Variant 1:* a proceeding:

(a) That is a main proceeding for an enterprise group member that would be a necessary and integral part of a group insolvency solution;

(b) In which a group representative has been appointed;

(c) In which there is a reasonable prospect of developing a group insolvency solution; and

(d) In which one or more additional group members are participating for the purpose of attempting to develop a group insolvency solution.<sup>13</sup>

*Variant 2:* [a main proceeding commenced in respect of an enterprise group member that is<sup>14</sup> a necessary and integral part of a group insolvency solution, in which one or more additional group members are participating<sup>15</sup> for the purpose of developing a group insolvency solution and in which a group representative has been appointed.]

<sup>11</sup> Variant 1 of subpara. (f) is taken from art. A, para. 3; subparagraph (c) is a substantive requirement covered by article E and thus may not need to be part of the definition.

<sup>12</sup> Variant 2 of subpara. (f) is a drafting proposal by the Secretariat.

<sup>13</sup> Variant 1 of subpara. (g) is taken from art. A, para. 4 as set forth in A/CN.9/864, para. 39.

<sup>14</sup> Variant 2 of subpara. (g) is a drafting proposal by the Secretariat. This variant provides that the group member “is” a “necessary and integral part” of the group insolvency solution, rather than using the phrase “would be” a necessary and integral part, which suggests an indeterminate time in the future.

<sup>15</sup> Although it may be more flexible to provide for future participation by group members by addition of the words “or are likely to participate”, art. B, para. 3 currently requires that one or more additional group members be participating in the main proceeding before the group representative can be appointed.

## Chapter 2. Cooperation and coordination<sup>16</sup>

### Article 9. Cooperation and direct communication between a court of this State and foreign courts or group representatives

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

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or group representatives concerning members of the same enterprise group [participating in a [planning proceeding] [group insolvency solution]] and in particular with respect to implementation of a group insolvency solution and the roles of the respective courts when such a solution is to be implemented.

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

Cooperation to the maximum extent possible for the purposes of article 9 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 the foreign court or group representative;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members participating in a [planning proceeding] [group insolvency solution];

(d) Coordination of concurrent foreign proceedings commenced with respect to enterprise group members participating in a [planning proceeding] [group insolvency solution];

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

(f) Approval of the treatment of the claims of creditors of the enacting State in a foreign proceeding;<sup>17</sup>

(g) Approval of agreements concerning the coordination of proceedings to facilitate the implementation of a group insolvency solution;

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<sup>16</sup> These articles of chapter 2 have been revised to take account of some elements of the regime proposed in chapters 3-4; further revisions may be required as those chapters are further developed to include, for example, foreign representatives of enterprise group members participating in a group insolvency solution in addition to the group representative. Such an addition might be relevant, in the context of the fact situation given above in para. 7 of A/CN.9/WG.V/WP.137 to include any insolvency representatives appointed to administer the liquidation or reorganization of debtors 3 and 4 in States B and C.

<sup>17</sup> This subparagraph will need to be aligned with whatever decision is taken with respect to draft art. F, in particular the application of that article in circumstances where there is no planning proceeding.

(g) bis Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;<sup>18</sup> and

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

**Article 11. Deleted**

**Article 12. Effect of communication under article 9<sup>19</sup>**

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

- (a) A compromise or waiver 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. Each 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.

**Article 13. Coordination of hearings**

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

**Article 14. Cooperation and direct communication between [group representatives] and foreign courts**

1. [In the matters referred to in article 1,] the [group representative] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives [of enterprise group members] to facilitate the development and implementation of a group insolvency solution.

<sup>18</sup> Subparagraph (g) bis has been added as suggested at the forty-eighth session: A/CN.9/864, para. 21(b).

<sup>19</sup> Support was expressed at the forty-eighth session (A/CN.9/864, para. 23) in favour of both deleting and retaining draft art. 12, but it was ultimately agreed that it should be retained in the text for further consideration.

2. The [group representative] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign representatives.

#### **Article 15. Cooperation to the maximum extent possible under article 14**

For the purposes of 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 participating in a [planning proceeding] [group insolvency solution], provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of proceedings to facilitate the implementation of a group insolvency solution;

(c) Allocation of responsibilities between the group representative and foreign representatives;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members participating in a [planning proceeding] [group insolvency solution]; and

(e) Coordination with respect to the proposal and negotiation of [reorganization plans] [a group insolvency solution].

#### **Article 17. Authority to enter into agreements concerning the coordination of proceedings**

An agreement concerning the coordination of proceedings may be entered into to facilitate the implementation of a group insolvency solution.

#### **Article 18. Appointment of a single [or the same] insolvency representative<sup>20</sup>**

1. The court may coordinate with foreign courts with respect to the [appointment] [recognition] of a single [or the same] insolvency representative to [administer] [coordinate] insolvency proceedings concerning members of the same

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<sup>20</sup> The intent of this article as originally drafted was to facilitate cooperation and coordination by appointing the same person as insolvency representative to all relevant group members in different States (provided that person was appropriately qualified) (see Legislative Guide, part three, chap. II, paras. 142-144). In the context of the regime proposed in chapters 3-4, however, this article might need to be revised or omitted, as a different approach is contemplated. Chapter 3 provides for appointment in the State of the COMI of one or more group members (in the fact situation provided in para. 7 of A/CN.9/WG.V/WP.137, debtors 1 and 2 in State A) of a group representative that can represent the State A proceedings in other States as required for the purposes of developing a group insolvency solution. It is not contemplated that foreign courts would cooperate with the court of State A in making that appointment, as the group representative represents only the proceedings in State A. That person, or another person, may be appointed to administer the reorganization or liquidation of debtors 1 and 2 in State A; that issue is not addressed by the provisions in chapter 3. For the purposes of developing a group insolvency solution, the group representative appointed in State A may not need to be appointed in other States provided the substance of chapters 3-4 is available, i.e. recognition, participation, standing, relief and so forth. Cooperation and coordination between the courts, other insolvency representatives and the group representative is addressed in the other articles of this chapter.



enterprise group in different States [where a group insolvency solution is being developed], provided that the insolvency representative is qualified for appointment in each of the relevant States.

2. To the extent required by applicable law, the insolvency representative is subject to the supervision of each appointing court.

## **Chapter 3. Facilitating the development and recognition of a group insolvency solution**

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

#### **Article B. Participation by enterprise group members in an insolvency proceeding in this State; appointment of a group representative<sup>21</sup>**

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State for an enterprise group member whose centre of main interests is located in this State, any other group member (whether solvent or insolvent)<sup>22</sup> may participate in that proceeding for the purpose of attempting to develop a group insolvency solution.

2. An insolvent enterprise group member whose centre of main interests is in another State may not participate in a proceeding under paragraph 1 if a court in that other State precludes it from so doing.<sup>23</sup>

<sup>21</sup> Art. B, para. 1 gives effect to Principles 2, 3 and 5. Principle 2: “When it is proposed that a group insolvency 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 planning proceeding.”; 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 a coordinating proceeding, the role of which would be exclusively procedural, rather than substantive. A proviso might be that a coordinating proceeding should be a proceeding taking place in a State that is the COMI of at least one of the enterprise group members that is a necessary and integral part of the enterprise group solution.”; and Principle 5, sentences 1 and 3: “1. Participation in the coordination process would be voluntary for those group members whose COMI is located in a jurisdiction different to that of the planning proceeding. 3. 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.” (see art. 10 of the Model Law).

<sup>22</sup> The use of the word “insolvent” should be understood as distinguishing those group members that may be subject to insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide, from those group members not so subject that may be described as “solvent”. See footnote 4 of A/CN.9/WG.V/WP.137. See also Legislative Guide, part three, rec. 238, which stresses the voluntary nature of participation by solvent group members.

<sup>23</sup> Para. 2 is taken from art. B, para. 2 as set forth in A/CN.9/864, para. 41. See footnote 15 of A/CN.9/WG.V/WP.137 on possibility of using permissive language in this draft para.

3. *Variant 1:* If one or more enterprise group members participate in a proceeding under paragraph 1, the court may appoint a group representative, who may then seek recognition from foreign courts and may seek to participate in any foreign proceeding related to a participating group member.<sup>24</sup>

*Variant 2:* If one or more enterprise group members participate in a proceeding referred to in paragraph 1 of this article, the court may appoint a group representative. The group representative is authorized to act in a foreign State on behalf of that proceeding and to participate in any foreign proceeding relating to the enterprise group members participating in the [group insolvency solution] [planning proceeding], as permitted by the applicable foreign law.<sup>25</sup>

#### **Principle 4, paragraph 2**

The court can receive a request for recognition of the type referred to in paragraph 1 of this principle.<sup>26</sup>

#### **Principle 5, sentence 2**

For those group members whose COMI is located in the same jurisdiction as the planning proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

#### **Article D. Relief available to a planning proceeding in this State**

2. To the extent needed to preserve the possibility of developing a group insolvency solution, the court may, at the request of the group representative, grant the following relief with respect to the assets or operations of any insolvent enterprise group member that is participating in the planning proceeding in this State:<sup>27</sup>

- (a) Staying execution against the enterprise group member's assets;
- (b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
- (c) Suspending the proceedings<sup>28</sup> temporarily to allow for the development of a group insolvency solution;

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<sup>24</sup> Variant 1 of para. 3 is taken from art. B, para. 3 as set forth in A/CN.9/864, para. 41.

<sup>25</sup> Variant 2 of para. 3 is a drafting proposal by the Secretariat that seeks to clarify the different elements of variant 1, drawing upon art. 5 of the Model Law.

<sup>26</sup> See principle 4, para. 1 below.

<sup>27</sup> See footnote 19 of A/CN.9/WG.V/WP.137. As currently drafted, the scope of this draft article is unclear. The chapeau appears to refer to the State in which the planning proceeding is taking place and it has thus been included in the category A provisions. It may also be relevant to the category B provisions. In that case, revision of the drafting might clarify that point and arts. D, 6 and 7 will need to be rationalized to avoid repetition and overlap.

<sup>28</sup> It may be desirable to add further language to clarify which proceeding subpara. 2(c) refers to — the planning proceeding or other proceedings that might be taking place in the State with respect to participating foreign debtors (e.g. for debtors 3 and 4 in State A).

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

(e) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

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

(g) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

## **B. Provisions relevant to a State in which recognition of a planning proceeding is sought**

### **Article 3. Recognition of a planning proceeding**

1. A group representative appointed in a planning proceeding may apply for recognition of that proceeding [in this State].<sup>29</sup>

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the planning proceeding and appointing the group representative; or

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

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the group representative.

3. An application for recognition shall also be accompanied by:<sup>30</sup>

(a) *Variant 1:* Evidence that [each group member sought to be represented in [a foreign proceeding] [a group insolvency solution]] has agreed to participate in that [proceeding] [solution]. Where such a group member is subject to

<sup>29</sup> Para. 1 of art. 3 incorporates art. C as set forth in A/CN.9/864, para. 43.

<sup>30</sup> Variant 1 of subpara. 3 (a) reflects drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(a)). Variant 2 of subpara. 3 (a) has been prepared by the Secretariat. Subpara. 3 (a) may not be required on the basis that a group representative cannot be appointed in a planning proceeding unless group members have been permitted to participate in that proceeding in accordance with art. B, para. 2. In other words, the court appointing the group representative has already considered the question of permission. Thus, all that may be required for recognition is that the group representative satisfies the other requirements of art. 3, paras. 2, 3 and 4.

insolvency proceedings<sup>31</sup> in the court of its centre of main interests, evidence shall be procured that any approval which may be required under the domestic law of the State of the commencement of proceedings for the participation in the [foreign proceeding] [proposed enterprise group insolvency solution] has been obtained;

(a) *Variant 2*: Evidence that an insolvent enterprise group member participating in the [planning proceeding] [foreign proceeding] whose centre of main interests is not in the State in which the planning proceeding commenced has [obtained permission to participate] [not been precluded from participating] in that proceeding in accordance with article B, paragraph 2;

[(b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the [group insolvency solution] [planning proceeding] that are known to the group representative.]<sup>32</sup>

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

#### **Principle 4, paragraph 1**

The court located in the COMI (the COMI court) of an enterprise group member participating in a group insolvency 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 planning proceeding taking place in another jurisdiction; and

(ii) Recognition by the court of the proceeding in the COMI jurisdiction.

#### **Article 6. Relief that may be granted upon application for recognition of a foreign proceeding**

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the group representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a [foreign proceeding] [planning proceeding] or the interests of the creditors, grant appropriate relief of a provisional nature, including:

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

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by

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<sup>31</sup> The words "subject to insolvency proceedings" are used throughout the Legislative Guide, part three to refer to those group members for which insolvency proceedings have commenced.

<sup>32</sup> Subpara. 3 (b) includes drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(d)).

their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

[(c) bis Entrusting the realization of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy];

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the [group insolvency solution] [planning proceeding] where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements[, subject to any appropriate safeguards the court may apply].<sup>33</sup>

(e) *Deleted*.<sup>34</sup>

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

3. Unless extended under article 7, subparagraph 1 (g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [group insolvency solution] [planning proceeding] [proceeding located in the COMI of an enterprise group member participating in the group insolvency solution].<sup>35</sup>

#### **Article 5. Decision to recognize a planning proceeding**

1. [Subject to any applicable public policy exception,] a planning proceeding shall be recognized if:

(a) and (b) *Deleted*;

(c) The application meets the requirements of [article 3, paragraphs ...] [is a planning proceeding within the meaning of article 2, paragraph (g)];<sup>36</sup>

(d) The application has been submitted to the court referred to in article ...;

(e) *Deleted*;

[(f) The foreign proceeding was commenced on the basis of the centre of main interests or establishment of the foreign group member or (if permissible under the laws of the enacting State) any other basis, including the presence of

<sup>33</sup> The additional text at the end of subpara. 1(d) was suggested at the forty-eighth session (A/CN.9/864, para. 36(c)). If the Working Group decides to retain art. 8 as drafted, para. 2 of that article would obviate the need to include those additional words in art. 6, subpara. 1(d). In principle support for including a provision of this nature on post commencement finance was expressed at the forty-fifth and forth-sixth sessions (A/CN.9/803, para. 30 and A/CN.9/829, para. 49 respectively). As drafted, subpara. 1(d) would apply both to post-application and post-commencement finance. This provision might need to be aligned with draft art. 7, para. (h).

<sup>34</sup> Subpara. 1(e) has been deleted following agreement at the forty-eighth session (A/CN.9/864, para. 36(d)).

<sup>35</sup> The additional text at the end of art. 6, para. 4 was suggested at the forth-eighth session (A/CN.9/864, para. 36(e)).

<sup>36</sup> Art. 5, para. 1 (c) incorporates art. C.

assets of the foreign group member or voluntary submission by the foreign group member to the jurisdiction of the court of the foreign State].<sup>37</sup>

*(g), (h) and (i) Deleted.*<sup>38</sup>

2. An application for recognition of a [foreign proceeding] [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 changes in the status of the [group insolvency solution] [planning proceeding] or in the status of their own appointment occurring after the application for recognition is made.

#### **Article 7. Relief that may be granted upon recognition of a planning proceeding**

1. Upon recognition of a planning proceeding, where necessary to protect the assets of the enterprise group member<sup>39</sup> or the interests of creditors and to facilitate the development of a group insolvency solution, the court may, at the request of the group representative, grant any appropriate relief, including:

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;<sup>40</sup>
- (b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;
- (c) Staying execution against the assets of the enterprise group member;
- (d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;
- (e) Entrusting the administration 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;

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<sup>37</sup> It was acknowledged at the forty-eighth session that the drafting of subpara. 1(f) gave rise to numerous concerns (A/CN.9/864, para. 35) and thus required further consideration. It has been retained in the revised draft text only to remind the Working Group of the need to discuss the issue of whether to depart in this draft text from the Model Law approach of recognizing proceedings only on the basis of COMI or establishment.

<sup>38</sup> Although there was agreement at the forty-eighth session to retain subparas. 1(g) and (h), they have been deleted from the revised draft text, as they repeated elements of the definition of “planning proceeding”. Para. (i) has been deleted following a suggestion at the forty-eighth session (A/CN.9/864, para. 34(b)).

<sup>39</sup> The drafting of some elements of art. 7 might need to specify which group members are being referred to — those in respect of which the planning proceeding commenced (i.e. that have their COMI in the State in which the planning proceeding commenced) or those participating in the planning proceeding that might have their COMI in the receiving State or both in some circumstances. Cf. art. 7, para. 2 and use of the words “in this State”, also see footnote 27 above and footnote 19 of A/CN.9/WG.V/WP.137 relating to art. D, para. 2.

<sup>40</sup> It might be noted that art.7, subparas. 1 (a) and (b) overlap with draft art. H, para. 1.

[(e) bis Entrusting the 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;]

(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) Extending any provisional relief granted;

(h) [When a group member located in this State is providing funding to other group members and is participating in the [group insolvency solution] [planning proceeding]], and [where permitted by relevant laws [of the receiving State]], recognizing existing arrangements concerning the funding of enterprise group members participating in the [group insolvency solution] [planning proceeding] and authorizing the continued provision of finance under those funding arrangements;<sup>41</sup>

(i) Subject to article 8, approving treatment in the foreign proceeding of the claims of creditors located in this State;<sup>42</sup> or

(j) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a planning proceeding the court may, at the request of the group representative, entrust the distribution 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, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

#### **Article D. Participation of a group representative in a proceeding in this State**

1. Upon recognition of a planning proceeding, the group representative may participate in any proceedings<sup>43</sup> in this State concerning enterprise group members that are participating in the planning proceeding.

#### **Article 8. Protection of creditors and other interested persons<sup>44</sup>**

1. In granting or denying relief under article 6 or 7, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 6 or 7 to conditions it considers appropriate.

<sup>41</sup> Additional language in art. 7, subpara. 1 (h) was agreed at the forty-eighth session (A/CN.9/864, para. 37(b)). This subpara. and art. 6, subpara. 1 (d) might need to be aligned.

<sup>42</sup> Art. 7, subpara. 1 (i) may need to be aligned to art. F, para. 1 and art. G, para. 1 noting that those articles are intended to apply irrespective of whether or not there is a planning proceeding.

<sup>43</sup> Are the proceedings referred to in this para. only insolvency proceedings? If so, the words “[*identify the laws of the enacting State relating to insolvency*]” might be added.

<sup>44</sup> There was general support at the forty-eighth session for inclusion of an article along the lines of art. 8 as drafted. The Working Group may wish to note that art. 8 may overlap with other articles, including art. H, para. 2.

3. The court may, at the request of the group representative or a person affected by relief granted under article 6 or 7, or at its own motion, modify or terminate such relief.

**Article E. Approval of local elements of a group insolvency solution<sup>45</sup>**

1. If a proposed group insolvency solution is developed in the planning proceeding, and the group representative submits to the court in this State<sup>46</sup>

*Variant 1:* the portion of the group insolvency solution affecting an insolvent group member whose centre of main interests [or establishment]<sup>47</sup> is in this State, the court shall submit the relevant portion of the group insolvency solution to the approval process in [refer to the relevant provisions in domestic insolvency law].<sup>48</sup>

*Variant 2:* that group insolvency solution, the court shall submit the relevant portion of the group insolvency solution affecting an insolvent group member whose centre of main interests [or establishment] is in this State to the approval process in [refer to the relevant provisions in domestic insolvency law].<sup>49</sup>

2. If the approval process [pursuant to] [referred to in] paragraph 1 results in approval of the portion of the group insolvency solution affecting the enterprise group member, the court shall confirm and implement those elements relating to assets or operations in this State.

**Principle 8**

The insolvency representative appointed in the proceeding designated as the planning proceeding is entitled to apply directly to a court in this State to be heard on issues related to implementation of the group insolvency solution.

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<sup>45</sup> Art. E, para. 1 gives effect to 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.” Art. E, para. 2 gives effect to 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.”

<sup>46</sup> The Working Group may wish to consider whether this article should clarify whether recognition of the planning proceeding is required for submission of the group insolvency solution to the foreign court.

<sup>47</sup> The reference to “establishment” is included in art. E (paras. 1 and 2) in accordance with a suggestion made at the forty-eighth session (A/CN.9/864, para. 48(b)).

<sup>48</sup> Variant 1 reflects art. E as proposed at the forty-eighth session (A/CN.9/864, para. 47).

<sup>49</sup> Variant 2 gives effect to the proposal at the forty-eighth session (A/CN.9/864, para. 48(a)) that the whole of the group insolvency solution should be submitted to the court, with the approval process applying only to the relevant local elements.



## Chapter 4. Treatment of foreign claims in accordance with applicable law<sup>50</sup>

### Article F. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

1. To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State.
2. A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1.

## Chapter 5. Supplemental provisions<sup>51</sup>

### Article G. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

1. To facilitate the treatment of claims that would otherwise be brought by creditors in a proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a proceeding in that other State.
2. A court in this State may stay or decline to open a main proceeding if a foreign representative or group representative from another State in which a proceeding is pending has made a commitment under paragraph 1.

<sup>50</sup> The provisions as set out in arts. F and G are not limited to cases where a group solution is being developed through a planning proceeding. Article F is part of the core provisions; article G is part of the supplemental provisions. They are presented as originally proposed at the forty-eighth session (A/CN.9/864, para. 49). However, a proposal made at the forty-eighth session to redraft the provisions (A/CN.9/864, para. 50) would result in the following, with art. F being based on the first paras. of arts. F and G. Whether the two paras. of art. G, as revised, should be considered to be core or supplemental provisions may, as noted, require further consideration:

*“Article F.*

*“A foreign representative or group representative appointed [in this State] may commit to, and the court [in this State] may approve, providing creditors with claims that could otherwise be brought in a proceeding in another State with the treatment in this State that they would have received had a proceeding commenced in that other State.”*

*“Article G.*

*“1. A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under article F.*

*“2. A court in this State may stay or decline to open a main proceeding if a foreign representative or group representative from another State in which a proceeding is pending has made a commitment under article F.”*

<sup>51</sup> As noted above in the introduction to A/CN.9/WG.V/WP.137, articles G and H are supplemental components, which would be additional options for a State to enact, and would go a step further than the core provisions.

**Article H. Additional relief**

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of creditors of affected enterprise group members would be adequately protected in the planning proceeding, the court, in addition to granting any relief described in article D, may stay or decline to open insolvency proceedings in this State relating to enterprise group members participating in the planning proceeding.<sup>52</sup>
  2. Notwithstanding article E, paragraph 1, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of creditors of the affected enterprise group member are adequately protected in the planning proceeding, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article D that is necessary for implementation of the group insolvency solution.
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<sup>52</sup> The type of additional relief referred to in art. H, para. 1 is potentially covered by art. 7, subparas. 1 (a) and (b), albeit available at a different time of the proceedings. The two articles may need to be aligned. Relief to support the group insolvency solution may come too late to be meaningful if it is only available following submission of that group solution for approval.