



General Assembly

Distr.: Limited
2 March 2017

Original: English

**United Nations Commission on
International Trade Law**
Working Group V (Insolvency Law)
Fifty-first session
New York, 10-19 May 2017

Facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions

Note by the Secretariat

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I. 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 groups¹ 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.

2. At its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2014) sessions, the Working Group considered the goals of a text that might be developed to facilitate the cross-border insolvency of multinational enterprise groups; the key elements of such a text, including those that might be based upon part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law); and the form that the text might take, noting that some of the key elements lent themselves to being developed as a model law, while others were perhaps more in the nature of provisions that might be included in a legislative guide ([A/CN.9/WG.V/WP.120](#), 124 and 128 respectively).

3. At its forty-eighth session, the Working Group agreed a set of key principles for a regime to address cross-border insolvency in the context of enterprise groups ([A/CN.9/WG.V/WP.133](#)) and considered a number of draft provisions addressing three main areas ([A/CN.9/WG.V/WP.134](#)): (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; and (c) the use of so-called “synthetic proceedings” in lieu of commencing non-main proceedings. Two additional supplemental areas were also considered. These might include (d) the use of so-called “synthetic proceedings” in lieu of commencing main proceedings, and (e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

4. At its forty-ninth session, the Working Group considered a consolidated draft legislative text incorporating the agreed key principles and draft provisions addressing the five areas indicated in paragraph 3 ([A/CN.9/WG.V/WP.137](#) and Add.1). That draft text was further considered at the fiftieth session ([A/CN.9/WG.V/WP.142](#) and Add.1)

5. The draft text below reflects the discussion and decisions taken at the fiftieth session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat’s work on the draft text. Notes and commentary to the draft text are included in this document as footnotes. It may be noted that the draft text has been divided into 5 chapters — chapter 1 deals with general provisions, chapter 2 with cooperation and coordination, chapter 3 with conduct of a planning proceeding in the enacting State, chapter 4 with recognition of a foreign planning proceeding and relief and chapter 5 with treatment of foreign claims.

¹ *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.

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

[Part A]

Chapter 1. General Provisions

Preamble

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

- (a) Cooperation between courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency affecting members of an enterprise group;
- (b) Cooperation between insolvency representatives appointed in this State and foreign States in cases of cross-border insolvency affecting members of an enterprise group;
- (c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;
- (d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors and other interested persons, including the debtors;
- (e) Protection and maximization of the overall combined value of the operations and assets of enterprise group members affected by insolvency and of the enterprise group as a whole;
- (f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and
- (g) Adequate protection of the interests of the creditors of each individual group member participating in a group insolvency solution.²

[Article 1. Scope

This Law applies to cooperation in the context of the cross-border insolvency of multinational enterprise groups.]³

Article 2. Definitions

For the purposes of these provisions:

- (a) “Enterprise” means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;
- (b) “Enterprise group” means two or more enterprises that are interconnected by control or significant ownership;
- (c) “Control” means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

² Para. (g) has been added to draft art. 1 in response to a proposal at the fiftieth session (A/CN.9/898, para. 109).

³ Draft art. 1 has been revised as proposed at the fiftieth session (A/CN.9/898, para. 110), with omission of the word “judicial” on the basis the text provides for cooperation that is broader than cooperation between courts. Since the draft text applies to more than cooperation in the context of the cross-border insolvency of enterprise groups, in particular in chapter 3, it may be appropriate to include additional words such as “and the conduct and administration of insolvency proceedings” after the word “cooperation”.

(d) “Enterprise group member” means an enterprise referred to in subparagraph (a), which forms part of an enterprise group as defined in subparagraph (b);

(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;⁴

(f) “Group insolvency solution” means a set of proposals developed in a planning proceeding:

(i) For the reorganization, sale, or liquidation of some or all of the operations or assets of one or more group members;

(ii) With the goal of [preserving] [preserving and enhancing] [preserving and maximizing] the overall combined value of the group members involved;⁵ and

(iii) 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;⁶

(g) “Planning proceeding” means a main proceeding;⁷

(i) Commenced in respect of an enterprise group member, which is a necessary and integral part of a group insolvency solution;

(ii) In which one or more additional group members are participating for the purpose of developing and implementing a group insolvency solution; and

(iii) In which a group representative has been appointed.

Additional definitions: foreign representative, insolvency representative, foreign proceeding⁸

Article 2 bis. Jurisdiction of the enacting State⁹

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

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

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

(c) Limit the commencement of insolvency proceedings in this State under [*identify laws of the enacting State relating to insolvency*], if required or requested

⁴ The definition of “group representative” has been revised as proposed at the fiftieth session (A/CN.9/898, para. 112).

⁵ Subpara. (f) (ii) of the definition of “group insolvency solution” includes various alternatives as proposed at the fiftieth session (A/CN.9/898, para. 113).

⁶ With respect to subpara. (f) (iii), it might be questioned whether a mandatory requirement for approval should be included in the definition of “group insolvency solution” or whether it might not be more appropriate to leave that requirement to an operative provision (e.g. art. 20) and delete subpara. (iii) from the definition.

⁷ At the fiftieth session, it was suggested that the definition of “planning proceeding” as drafted was ambiguous (A/CN.9/898, para. 114). The revised drafting of subpara. (g) (i) is intended to clarify that ambiguity — a planning proceeding is a main proceeding (where main proceeding has the same meaning as art. 2(b) of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) commenced with respect to a group member where the group member is a necessary and integral part of the group insolvency solution.

⁸ It might be noted that depending on the final form of the text, additional definitions of foreign representative, insolvency representative and foreign proceeding might be required.

⁹ This draft art. has been included as a separate provision in response to a decision at the fiftieth session (A/CN.9/898, para. 110) to remove it from the scope in art. 1. A new heading is suggested.

to address the insolvency of an enterprise group member. When proceedings are not required or requested in this State, there is no obligation to commence such proceedings.]

Article 2 ter. Public policy exception¹⁰

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 2 quater. Competent court or authority¹¹

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

Chapter 2. Cooperation and coordination

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

1. In the matters referred to in article 1,¹² the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, where appointed, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* or other person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts, foreign representatives or a group representative, where appointed.

Article 4. Cooperation to the maximum extent possible under article 3

Cooperation to the maximum extent possible for the purposes of article 3 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, a foreign representative or a group representative, where appointed;
- (c) Coordination of the administration and supervision of the affairs of the enterprise group members;
- (d) Coordination of concurrent foreign 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 of the treatment in a foreign proceeding of the claims of creditors of the enacting State];

¹⁰ Following agreement that the draft text should be subject to a public policy exception, draft art. 2 ter has been added (A/CN.9/898, para. 91). If not ultimately required because of the form the final text takes (i.e. as part of the Model Law), it can be deleted.

¹¹ Draft art. 2 quater has also been added for the sake of completeness, given the substance of draft art. 16(1)(b). Like draft art. 2bis, it may also be deleted if not required because of the final nature of the text.

¹² Given that revised art. 1 refers only to cooperation, the Working Group may wish to consider whether the opening phrase of art. 3 (as well as arts. 7 and 7bis) — “In the matters referred to in article 1” — remains appropriate or might be modified, for example, to something narrower such as “In the context of article 1”, or deleted entirely.

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

(h) Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;

(i) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between members of an enterprise group concerning claims;¹³

(j) Approval of the treatment of claims between members of an enterprise group;

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

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

Article 5. Limitation of the effect of communication under article 3

1. 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.¹⁴

2. Participation by a court in communication pursuant to article 3, 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 6. 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.

¹³ Subparas. (i), (j) and (k) have been added to draft art. 4 pursuant to agreement at the fiftieth session (A/CN.9/898, paras. 63-64). With respect to subpara. (i), para. 63 of A/CN.9/898 refers to the use of mediation and arbitration to resolve “intergroup claims” (clarified in subpara. (i) to mean claims between members of an enterprise group); the Working Group may wish to consider whether mediation and arbitration might also be used to resolve claims against group members more generally, and not only between group members.

¹⁴ Para. 1 of draft art. 5 is based upon the words previously contained at the end of subpara. 2 (f) and states the general principle of art. 5 (A/CN.9/898, para. 63).

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

1. [In the matters referred to in article 1,]¹⁵ a group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.
2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign representatives of other enterprise group members.

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

1. [In the matters referred to in article 1,]¹⁶ a [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.
2. A [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts, foreign representatives of other group members and a group representative, where appointed.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis¹⁷

For the purposes of article 7 and article 7 bis, 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 proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;
- (c) Allocation of responsibilities between a [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State], a foreign representative and a group representative, where appointed;
- (d) Coordination of the administration and supervision of the affairs of the enterprise group members; and
- (e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

¹⁵ With respect to the opening words, see footnote 12, relating to draft art. 3 (and 7 bis). The words “appointed in this State” have been added in para. 1 to clarify the scope of this draft art.

¹⁶ See footnotes 12 and 15, relating to opening words in square brackets.

¹⁷ Draft art. 8 has been revised in accordance with decisions of the Working Group at its fiftieth session (A/CN.9/898, para. 69).

Article 9. Authority to enter into agreements concerning the coordination of proceedings¹⁸

Agreements concerning the coordination of proceedings involving two or more enterprise group members located in different States may be entered into, including where a group insolvency solution is being developed.

Article 10. Appointment of a single or the same insolvency representative¹⁹

1. The court may coordinate with foreign courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group in different States.

2. The appointment of an insolvency representative in this State and in another State under paragraph 1 does not diminish the obligations of the insolvency representative under the law of this State.

Chapter 3. Conduct of a planning proceeding in this State²⁰

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

1. Subject to paragraph 2, if a proceeding under [identify laws of the enacting State relating to insolvency] has commenced with respect to an enterprise group member whose centre of main interests is located in this State, any other group member may participate in that proceeding for the purpose of developing and implementing a group insolvency solution.²¹

2. An enterprise group member whose centre of main interests is located in another State may participate in a proceeding referred to in paragraph 1 unless a court in that other State [precludes] [prohibits] it from so doing.²²

3. Participation in a proceeding referred to in paragraph 1 does not subject an enterprise group member to the jurisdiction of the courts of this State. Participation means that the group member has the right to appear, make written submissions and be heard in that proceeding on matters affecting that group member's interests and to take part in the development and implementation of a group insolvency solution.²³

¹⁸ Draft art. 9 has been revised in accordance with decisions of the Working Group at its fiftieth session (A/CN.9/898, para. 70).

¹⁹ Para. 1 of draft art. 10 has been revised as agreed at the fiftieth session (A/CN.9/898, para. 71) by deleting the words at the end of the draft para. and retaining the words "or the same" without square brackets. While it was suggested that para. 2 — "To the extent required by applicable law the insolvency representative is subject to the supervision of each appointing court" — might be redrafted as a model law provision, it is perhaps a matter for consideration by enacting States in the light of their approach to the regulation of insolvency representatives; it might be noted that not all States regulate such professionals. Accordingly, it may be appropriate to address that issue in a guide to enactment, rather than in the draft text. Draft para. 2 proposes addressing slightly different issues, clarifying that the obligations of an insolvency representative under the law of the enacting State are not diminished when they are also appointed in other States.

²⁰ In accordance with a suggestion at the fiftieth session, draft arts. 11-13 are now included in chapter 3, which addresses the national law elements relevant to the commencement and conduct of a planning proceeding in the enacting State (A/CN.9/898, para. 85). Chapter 4 deals with cross-border provisions on recognition of the planning proceeding and relief.

²¹ Draft art. 11 has been revised in accordance with a number of decisions taken at the fiftieth session (A/CN.9/898, paras. 72-78), including removing references to "solvent" and "insolvent" group members.

²² Draft para. 2 of art. 11 addresses the group members that may participate in a proceeding described in para. 1 — rather than referring to "preclusion", which may have a specific meaning in some jurisdictions, for greater clarity it is suggested that the word "prohibit" might be preferable.

²³ Draft para. 3 of art. 11 seeks to clarify that participation does not involve submission to the jurisdiction of the planning proceeding court, as well as what participation might encompass.

4. Participation in a proceeding referred to in paragraph 1 by any other enterprise group member is voluntary. The group member may commence its participation or opt out of participation at any stage of such a proceeding.²⁴

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.²⁵

Article 12. Appointment of a group representative²⁶

1. When one or more enterprise group members are participating in a proceeding referred to in article 11, the court may appoint a group representative to that proceeding, which is then a planning proceeding.

2. *[Specify the procedure for appointment of a group representative].*²⁷

3. *[The group representative is authorized to seek relief in this State to support the development and implementation of a group insolvency solution.]*²⁸

4. The group representative is authorized to act in a foreign State on behalf of a planning proceeding [as permitted by the applicable foreign law] and, in particular, to:

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

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

(c) Seek to participate in a foreign proceeding relating to a group member not participating in the planning proceeding.²⁹

Article 13. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing a group insolvency solution and to protect the assets of an enterprise group member [subject to or participating in] a planning proceeding or the interests of the creditors [of such a group member], the court, at the request of the group representative, may grant any of the following relief:³⁰

²⁴ The second sentence might be considered as a definition for inclusion in draft art. 2.

²⁴ Draft para. 4 of art. 11 confirms that participation is voluntary and that it may commence and end at any stage of the planning proceeding.

²⁵ Draft para. 5 of art. 11 deals with the provision of notice to participating group members; the reference to “actions taken” is intended to indicate that notice might be required of specific steps taken, such as the sale of assets, rather than notice of progress towards the development of the group insolvency solution in some more general manner that might prove difficult to satisfy.

²⁶ Draft art. 12 reflects a number of agreements at the fiftieth session (A/CN.9/898, para. 75). Para. 1 deals with appointment of a group representative to a proceeding of the type referred to in art. 11, which thus becomes, in accordance with the definition in draft art. 2 (g), a planning proceeding. The definition in draft art. 2 (e) of “group representative” clarifies that that person is authorized to act as representative of that planning proceeding.

²⁷ Draft para. 2 of art. 12 reflects a suggestion at the fiftieth session that the draft text might address the procedure for appointment of a group representative (A/CN.9/898, para. 75). Since no details were proposed, para. 2 serves to note that the enacting State may wish to specify the procedure in this art.

²⁸ Draft para. 3 of art. 12 reflects a suggestion at the fiftieth session that the draft text might include authorization for the group representative to seek relief in the enacting State to support the group insolvency solution (A/CN.9/898, para. 75).

²⁹ Draft para. 4 of art. 12 provides the authorization for the group representative to act in a foreign State for the purposes indicated in subparas. (a) through (c), including as suggested at the fiftieth session that they should be able to participate in a foreign proceeding with respect to a group member not participating in the planning proceeding (A/CN.9/898, para. 75).

³⁰ The chapeau of draft art. 13 has been aligned with the chapeaux of draft arts. 15 and 17 and revised to reflect suggestions made at the fiftieth session (A/CN.9/898, para. 81) to include references to group members both “subject to” and “participating in” the planning proceeding, noting that the Working Group has not yet reached a clear decision on that issue (A/CN.9/898,

- (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) Staying [temporarily] any [insolvency] proceedings concerning a participating enterprise group member;³¹
- (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;
- (g) Recognizing arrangements concerning the funding of enterprise group members [participating in the planning proceeding] where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply;³² and
- (h) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. With respect to the assets or operations located in this State of an enterprise group member that has its centre of main interests in another State, relief under this article may only be granted if that relief [is not incompatible with relief granted in insolvency proceedings taking place in that State] [does not interfere with the administration of insolvency proceedings taking place in that State].³³

Chapter 4. Recognition of a foreign planning proceeding and relief³⁴

Article 14. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the planning proceeding to which the group representative was appointed.³⁵
2. An application for recognition shall be accompanied by:

para. 81). The draft chapeau also seeks to clarify which creditors are being referred to.

³¹ Subpara. 1 (c) of draft art. 13 includes some alternative language to clarify which proceedings concerning which group member are the subject of the temporary stay (to distinguish that subpara. from subparas. 1 (a) and (d)) (see also draft arts. 15, subpara. 1(c) and 17, subpara. 1(d)).

³² Subpara. 1 (g) of draft art. 13 reflects agreement to delete certain words (A/CN.9/898, para. 83). In view of the fact that no conclusion has yet been reached with respect to whether the provision applies to group members "subject to" or "participating in" a planning proceeding or both, the limitation in subparagraph (g) to group members "participating in" the planning proceeding has been placed in square brackets and will need to be further considered in the context of the drafting of the chapeau. The equivalent provisions in draft arts. 15, subpara. 1(g) and 17, subpara. 1(h) are limited in scope to participating group members.

³³ Draft para. 2 of draft art. 13 reflects a suggestion that a different standard might be appropriate for assessing the relief to be granted (A/CN.9/898, para. 84), based upon draft art. 15 (5).

³⁴ Chapter 4 addresses provisions on recognition of a foreign planning proceeding and the relief available to assist that proceeding.

³⁵ The drafting of para. 1 of draft art. 14 has been revised to streamline the language. Revisions to paras. 2 and 3 reflect decisions taken at the fiftieth session (A/CN.9/898, paras. 87, 88 and 89). The closing words of subpara. 3(a) may need to be aligned with draft art. 11 (2) to focus on preclusion or prohibition, rather than on approval. While it was noted (A/CN.9/898, para. 88), that the test in subpara. 3 (b) might be burdensome, no alternative test was provided.

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

(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 planning proceeding and of the appointment of the group representative.

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

(a) Evidence identifying each enterprise group member participating in the planning proceeding. When a participating group member is subject to insolvency proceedings in the court of its centre of main interests, the application shall be accompanied by evidence that [any approval which may be required under the domestic law of the State of the commencement of proceedings for participation in the planning proceeding has been obtained] [participation has not been precluded in accordance with article 11, 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 planning proceeding that are known to the group representative]; and

(c) A statement to the effect that a group member subject to the planning proceeding has its centre of main interests in the jurisdiction where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members involved.

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

Article 15. Interim relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition until the application is decided upon, where urgently needed to preserve the possibility of developing and implementing a group insolvency solution and to protect the assets of an enterprise group member participating in a planning proceeding or the interests of the creditors [of such a group member], the court, at the request of the group representative, may grant appropriate relief of a provisional nature, including:³⁶

(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) Staying [temporarily] any [insolvency] proceedings concerning the enterprise group member;³⁷

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

³⁶ As noted above, the chapeau of draft art. 15 has been broadly aligned with draft arts. 13 and 17. In accordance with agreement at the fiftieth session (A/CN.9/898, para. 101), language limiting the provision to participating group members has been introduced (see para. 101), and the reference to group members subject to the planning proceeding deleted. The Working Group may wish to confirm the group members in respect of which the relief under draft arts. 15 and 17 should be available. Is the limitation to participating group members intended to indicate, for example, that relief with respect to those group members subject to the planning proceeding is not required or that it should be sought under some other instrument, such as the Model Law?

³⁷ Subpara. 1 (c) of draft art. 15 includes some alternative language to clarify which proceedings are the subject of the temporary stay (to distinguish that subpara. from subparas. 1 (a) and (d)) (see also draft arts. 13, subpara. 1(c) and 17 subpara. 1(d)).

[(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;]³⁸

(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;

(g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply;³⁹ and

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

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

3. Unless extended under article 17, subparagraph 1 (a), the relief granted under this article terminates when the application for recognition is decided upon.

[4. Relief under this article may not be granted with respect to the assets and operations located in this State of any group member participating in a planning proceeding [if that group member is not subject to insolvency proceedings] [if insolvency proceedings with respect to that group member have not commenced] [in any jurisdiction]].⁴⁰

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [planning proceeding] [proceeding located in the centre of main interests of an enterprise group member participating in the planning proceeding].

Article 16. Decision to recognize a foreign planning proceeding

1. Subject to article 2 ter, a planning proceeding shall be recognized if:⁴¹

(a) The application meets the requirements of article 14, 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 2 quater;

³⁸ A further issue to be considered relates to draft art. 17, subpara. 1 (e), which has been placed in square brackets pending further consideration of draft art. 17, para. 2. It might be noted that draft subpara. 1 (e) parallels art. 19 (1)(b) of the Model Law addressing interim relief, while draft art. 17 (2) parallels art. 21 (2) of the Model Law, addressing discretionary relief available following recognition of a foreign proceeding. Draft subpara. 1 (e) focuses on interim relief available to protect assets in jeopardy, but is limited to administration or realization of those assets, while draft art. 17 (2) addresses distribution following recognition and requires the court to be satisfied that the interests of creditors are protected. See draft art. 17, para. 2 below.

³⁹ See footnote 32 above with respect to subpara. 1 (g) of draft art. 15. Given that draft art. 15, like draft art. 17, applies only to those group members participating in the planning proceeding, it is potentially narrower in scope than draft art. 13. In view of the limitation included in the chapeau to draft art. 15, the words "participating in the planning proceeding" do not need to be repeated in the subpara.

⁴⁰ Draft para. 15, para. 4 has been included in the text as a possible means of clarifying that relief is not available with respect to those group members participating in a planning proceeding that are "solvent" or, in other words, not subject to any insolvency proceeding (A/CN.9/898, para. 85).

⁴¹ It was agreed at the fiftieth session that draft art. 16 should be subject to a public policy exception (A/CN.9/898, para. 91); this exception is now reflected in draft art. 2 ter.

2. An application for recognition of a 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 planning proceeding or in the status of their own appointment occurring after the application for recognition is made.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a planning proceeding [or at any time thereafter], where necessary to preserve the possibility of developing and implementing a group insolvency solution and to protect the assets of an enterprise group member participating in the planning proceeding or the interests of the creditors [of such a group member] the court, at the request of the group representative or [...], may grant any of the following relief:⁴²

- (a) Extending of any relief granted under article 15, paragraph 1;
- (b) Staying execution against the enterprise group member's assets;
- (c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
- (d) Staying [temporarily] any [insolvency] proceedings concerning the enterprise group member;⁴³
- (e) Staying the commencement or continuation of individual actions or individual proceedings concerning the enterprise group member's assets, rights, obligations, or liabilities;
- (f) 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;
- (g) 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;
- (h) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply;⁴⁴

⁴² The chapeau of draft art. 17 has been revised to align it generally with draft arts. 13 and 15 and in accordance with suggestions made at the fiftieth session (A/CN.9/898, para. 93) — addition of the words “or at any time thereafter”, the place holder for a reference to persons other than the group representative that might apply for such relief (while no indication was provided as to which other persons might be appropriate), the limitation of the provision to group members “participating in the planning proceeding” and the reference to the creditors “of such group members”.

By using the words “Upon recognition”, the drafting of the chapeau of para. 1 follows that of art. 21 of the Model Law. Art. 21 has been interpreted to mean that recognition is the pre-condition to granting discretionary relief and that that relief may be sought at any time after recognition; its availability is not limited to the time recognition is granted. Accordingly, the words “at any time thereafter” are not required and the availability of relief at any time after recognition might be clarified in the guide to enactment.

⁴³ Subpara. 1 (d) of draft art. 17 includes some alternative language to clarify which proceedings are the subject of the temporary stay (to distinguish that subpara. from subparas. 1 (b) and (e)) (see also draft arts. 13, subpara. 1(c) and 15 subpara. 1(c)).

⁴⁴ Subpara. 1(h) of draft art. 17 has been revised in accordance with the equivalent provisions

[(i) Subject to article 19, approving the treatment in the foreign proceeding of the claims of creditors located in this State]; and

(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, at the request of the group representative, may entrust the distribution 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, provided that the court is satisfied that the interests of creditors in this State are adequately protected.]⁴⁵

[3. Relief under this article may not be granted with respect to the assets and operations located in this State of any group member participating in a planning proceeding [if that group member is not subject to insolvency proceedings] [if insolvency proceedings with respect to that group member have not commenced] [in any jurisdiction]].⁴⁶

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

Upon recognition of a planning proceeding, the group representative may participate in any proceeding under *[identify laws of the enacting State relating to insolvency]* concerning enterprise group members that are participating in the planning proceeding [and enterprise group members that are not participating in the planning proceeding].⁴⁷

Article 19. Protection of creditors and other interested persons⁴⁸

1. In granting or denying relief under article 15 or 17 [or 21], 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 enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under article 15 or 17 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 article 15 or 17, or at its own motion, modify or terminate such relief.

in 13 (1) (g) and 15 (1). In view of the limitation included in the chapeau to draft art. 17, the words "participating in the planning proceeding" do not need to be repeated in the subpara. (g). Given that draft art. 17, like draft art. 15, applies only to those group members participating in the planning proceeding, it is potentially narrower in scope than draft art. 13.

⁴⁵ With respect to draft art. 17, para. 2, concerns were expressed about the similarity with draft art. 17, subpara. 1(f), and the absence in para. 2 of the protections applicable by virtue of the chapeau to subpara. 1(f). The origin of these provisions in the Model Law might be noted, as explained above in footnote 37.

⁴⁶ Draft art. 17, para. 3 has been added to the draft art. in response to a suggestion at the fiftieth session (A/CN.9/898, para. 85) to emphasize that relief cannot be ordered with respect to the assets and affairs of a group member not subject to insolvency proceedings (previously described as a solvent group member).

⁴⁷ The phrase in square brackets at the end of draft art. 18 has been added to provide authorization in the receiving State that parallels the authorization provided under draft art. 12 in the originating State.

⁴⁸ Revisions to paras. 1 and 2 of draft art. 19 are in accordance with proposals made at the fiftieth session (A/CN.9/898, para. 98); the Working Group may wish to consider whether draft art. 21 should also be subject to the protections of draft art. 19.

Article 20. Approval of local elements of a group insolvency solution⁴⁹

1. Where a group solution affects a group member participating in a planning proceeding that has its centre of main interests or establishment in this State and a proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced [in this State], the group insolvency solution shall be submitted to the court [in this State] for approval.
2. The court shall refer the portion of the group solution affecting the group member referred to in paragraph 1 for approval in accordance with [*identify the laws of the enacting State relating to insolvency*].
3. If the approval process referred to in paragraph 2 results in approval of the relevant portion of the group insolvency solution, the court shall [confirm and implement those elements relating to assets or operations in this State] [*specify the role to be played by the court in accordance with the law of the enacting State with respect to approval of a reorganization plan*].
4. Where a group solution affects a group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State or article 21 applies, [*specify how, in those situations, the relevant elements of the group insolvency solution may be made binding and effective as required by the law of the enacting State*].
5. 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 the group insolvency solution.

Chapter 5. Treatment of foreign claims**Article 21. 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 a creditor in a non-main proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may commit to, and the court in this State may approve, providing that creditor with the treatment in this State that they would have received in a non-main proceeding in that other State. [Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.]⁵⁰
2. [Subject to article 19], a court in this State may stay or decline to commence a non-main proceeding if a foreign representative of an enterprise group member or a group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1.

⁴⁹ Draft art. 20 has been revised in accordance with proposals at the fiftieth session (A/CN.9/898, paras. 99-100). The words in square brackets in para. 4 have been revised and redundant language in paragraph 5 deleted (referring to the group representative as “appointed in a planning proceeding”).

⁵⁰ Draft art. 21, para. 1 has been revised in accordance with A/CN.9/898, paras. 102-103 and to give effect to the changes made to the definitions in draft art. 2. Given the nature of the draft text, the drafting has been amended to indicate that the reference to “formal requirements” is to the requirements “of this State”, rather than to the State in which the planning proceeding commenced as previously specified. Draft para. 2 includes a possible reference to the qualifications of draft art. 19. The Working Group may wish to recall and consider the questions raised at the fiftieth session in para. 103 of A/CN.9/898.

[Part B]**Supplemental provisions****Article 22. 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 a creditor in a proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may commit to, and the court in this State may approve, providing that creditor with the treatment in this State that they would have received in a proceeding in that other State. [Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.]⁵¹

2. Subject to article 19, a court in this State may stay or decline to commence a main proceeding if a foreign representative of an enterprise group member or a group representative from another State in which a proceeding is pending has made a commitment under paragraph 1.

Article 23. Additional relief

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in the planning proceeding, particularly where a group representative has made a commitment under article 21 or 22, the court, in addition to granting any relief described in article 17, may stay or decline to commence insolvency proceedings in this State relating to enterprise group members participating in the planning proceeding.⁵²

2. Notwithstanding article 20 if, upon submission of a proposed group insolvency solution by the group representative, [particularly where a commitment under article 21 or 22 has been made,] the court is satisfied that the interests of the creditors of the affected enterprise group member are adequately protected [in the group insolvency solution], the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 17 that is necessary for implementation of the group insolvency solution.⁵³

⁵¹ The second sentence of draft art. 22, para. 1 includes the formal requirements from draft art. 21 and subjects the draft art. to the protections of draft art. 19, which might be sufficient to address considerations such as whether local creditors covered by the commitment would be adequately protected in the planning proceeding and whether the protection of those local creditors would be improved by the commencement of a local proceeding. Other considerations a court might take into account could include: whether the realization of assets located in the main jurisdiction would be facilitated by commencement of an insolvency proceeding; the court's ability or preparedness to coordinate and cooperate with the planning proceeding court; and the extent to which commencement of an insolvency proceeding might impede achievement of the purpose of the planning proceeding or might interfere with the administration of that proceeding. The Working Group may wish to consider whether further protections should be included in the drafting or whether the reference to draft art. 19 is sufficient. The Working Group may also wish to recall and consider the questions raised at para. 104 of [A/CN.9/898](#) concerning the scope and operation of draft art. 22.

⁵² Draft art. 23, para. 1 reflects proposals made at the fiftieth session ([A/CN.9/898](#), para. 108). The cross-reference should probably be to draft art. 17, which relates to relief available on recognition, rather than to draft art. 13, which refers to relief available in the State of the planning proceeding.

⁵³ In draft art. 23, para. 2, the first set of words in square brackets has been added to reflect the addition to para. 1 ([A/CN.9/898](#), para. 108). The reference to the protection of the group member's interests in the planning proceeding has been amended to refer to protection of those interests in the group insolvency solution, since it is the approval of that solution that is under consideration. As noted above, the cross-reference in the last part of the draft art. should be to draft art. 17, rather than draft art. 13.