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UNCITRAL Legislative Guide on Insolvency Law

Part three: Treatment of enterprise groups in insolvency

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III. Addressing the insolvency of groups: international issues

A. Introduction

1. The introduction to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation [the Practice Guide][1] notes that although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvencies, but also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities in and, in some cases, conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law that will be applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is the goal.

2. In addition to the inadequacy of existing laws, the absence of predictability as to their application in practice and associated cost and delay has added a further layer of uncertainty that can impact upon capital flows and cross-border investment. Acceptance of different types of proceedings, understanding of key concepts and the treatment accorded to parties with an interest in insolvency proceedings differs. Reorganization or rescue procedures, for example, are more prevalent in some countries than others. The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varies widely. Different countries also recognize different types of proceedings with different effects. An example in the context of reorganization proceedings is the cases in which the law of one State envisages a debtor in possession continuing to exercise management functions, while under the law of another State in which contemporaneous insolvency proceedings are being conducted with respect to the same debtor, existing management will be displaced or the debtor's business liquidated. Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws do not accord recognition to universality claimed by foreign insolvency proceedings. In addition to differences between key concepts and treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, regarded as a key element of many laws, cannot be applied effectively across borders.

3. In the international context, the models that have been created to address cross-border insolvency issues have always stopped short of dealing satisfactorily with enterprise groups. When the United Kingdom's House of Lords sitting under

[1] Adopted by the Commission on 1 July 2009.

the chairmanship of Lord Hoffmann considered whether the United Kingdom should subscribe to the European Convention on Insolvency Proceedings, the committee commented on the failure of the convention to deal with groups of companies—the most common form of business model. When the convention became the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), it still did not address the issue. When the text of what became the UNCITRAL Model Law on Cross-Border Insolvency was debated, groups were regarded as "a stage too far".

4. A well-reported case that illustrates one of the key problems with respect to groups in the international context was the KPNQwest group, which failed the day the EC Regulation came into force, 31 May 2002. KPNQwest was a telecoms group that owned and operated a fibre-optic cable network around Europe and to the United States. The main cables were in rings: for the ring around Europe, the French part of the ring was owned by a French subsidiary; the German part by a German subsidiary, and so on. When the Dutch parent failed, many of the subsidiaries were obliged to file for the protection of the court in the jurisdictions in which they were incorporated. No one was able to coordinate the proceedings and it was effectively broken up. A discussion of other international cross-border cases would confirm the shortcomings of the existing system; there is often a clear tension between the traditional separate legal entity approach to corporate regulation and its implications for insolvency and the facilitation of insolvency proceedings against a group or part of a group in a cross border situation in a manner that would enable the goal of maximizing value for the benefit of all creditors to be achieved. The history of cross-border insolvency since the Maxwell case in 1991[2] underscores the problems encountered in managing numbers of parallel proceedings, and the need for the creative solutions that have been developed and adopted. Some of these solutions are discussed in the Practice Guide, but the development of a legislative regime to address the cross-border insolvency of enterprise groups remains a challenge to be met.

5. There has been considerable discussion in recent times as to what might form the basis of a legal regime to address the cross-border insolvency of enterprise groups. Some suggestions have included adapting the concept of "centre of main interests" as it applies to an individual debtor and to an enterprise group to enable all proceedings with respect to group members to be commenced in, and administered from, a single centre through one court and subject to a single governing law. Another suggestion has been to identify a coordination centre for the group, which might be determined by reference to the location of the controlling member of the group or to permit group members to apply for insolvency in the State in which proceedings have commenced with respect to the insolvent parent of the group.[3]

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[2] This case involved the United States and the United Kingdom. United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of Justice, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

[3] These issues are discussed in some detail in the working papers of UNCITRAL Working Group V (Insolvency law) – see A/CN.9/WG.V/WP.85/Add.1, paras. 3-12; A/CN.9/WG.V/WP.82/Add.4, paras. 3-15; A/CN.9/WG.V/WP.76/Add.2, paras. 2-17; A/CN.9/WG.V/WP.74/Add.2, paras. 6-12.

6. These proposals raise significant and difficult issues. Some relate to the very nature of multinational enterprise groups and how they operate – how to define what constitutes an enterprise group for insolvency purposes and identify the factors that might appropriate to determine where the group centre is located, assuming that there is only one centre for each group – as well as to questions of jurisdiction over the constituent members of the group, eligibility to commence insolvency proceedings and applicable law. Others relate to the challenge of reaching broad international agreement on these issues in order to achieve a consistently, widely applied and, possibly, binding solution that will deliver certainty and predictability to the cross-border insolvency of enterprise groups.

B. Promoting cross-border cooperation and coordination of enterprise group insolvencies

1. Introduction

7. The first step in finding a solution to the problem of how to facilitate the global treatment of enterprise groups in insolvency might be to ensure existing principles for cross-border cooperation apply to enterprise group insolvencies. Cooperation between courts and insolvency representatives in insolvency proceedings involving multinational enterprise groups may help to facilitate commercial predictability and increase certainty for trade and commerce, as well as fair and efficient administration of proceedings that protects the interests of the parties, maximizes the value of the assets of group members to preserve employment and minimizes costs. Although there are enterprise groups where separate insolvency proceedings may be a feasible option because there is a low degree of integration in the group and group members are relatively independent of each other, for many groups, cooperation may be the only way to reduce the risk of piecemeal insolvency proceedings that have the potential to destroy going concern value and lead to asset ring-fencing, as well as asset shifting or forum shopping by debtors.

8. A widespread limitation on cooperation and coordination between courts and insolvency representatives from different jurisdictions in cases of cross-border insolvencies derives from a lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts and insolvency representatives. The Model Law provides that legislative framework authorizing cross-border cooperation and communication between courts, between courts and insolvency representatives and between insolvency representatives.

9. However, since the provisions of the Model Law focus on individual debtors, they have limited application to enterprise groups. A key difference in coordinating enterprise group insolvencies is that the court in one jurisdiction is not necessarily dealing with the same debtor as the courts in other jurisdictions (although there may be a common debtor in the case of individual group members with assets in different States, a situation within the scope of the Model Law). The link between parallel proceedings is not a common debtor, but rather that the debtors are all members of the same enterprise group. Unless the existence (and possibly the extent) of that group is or can be recognized under national law, each proceeding will appear to be

unconnected to each other proceeding and cooperation will appear to be unwarranted on the basis that it might interfere with the independence of local courts or be deemed unnecessary because each proceeding is, essentially, a national proceeding. While it may be possible in some instances to treat each group member entirely separately, for many enterprise groups the best result for each of the different members may be achieved through a more widely-based and potentially global solution that reflects the manner in which the group conducted its business and addresses either distinct business sections or the enterprise group as a whole, particularly where the business is closely integrated.

10. For these reasons, it is desirable that an insolvency law recognize the existence of enterprise groups and the need, with respect to cross-border cooperation, for courts to cooperate with other courts and with insolvency representatives, not just with respect to insolvency proceedings concerning the same debtor, but also with respect to different members of an enterprise group.

2. Forms of cooperation involving courts

11. Cooperation in cross-border insolvencies may take different forms and may include, as suggested in article 27 of the Model Law, communication between the courts, between the courts and insolvency representatives and between the insolvency representatives, as well as the use of cross-border insolvency agreements, coordination of hearings, and coordination of the supervision and administration of the debtor's affairs. In the context of a single debtor, authorization for cooperation is provided by articles 25 and 26 of the Model Law. Article 25 authorizes the court to cooperate to the maximum extent possible with foreign courts, while Article 26 authorizes an insolvency representative, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts and representatives. The issue of cooperation is also addressed, within the European Union, by the EC Insolvency Regulation. Recital 20 notes that in the context of main and secondary proceedings the liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. The liquidator in the main proceedings should have the ability to intervene in the secondary proceedings and to propose a restructuring plan or apply for suspension of the realization of assets in those proceedings. Article 31 of the EC Regulation establishes a duty of liquidators in main and secondary proceedings to communicate information, particularly information that may be relevant to the other proceedings and relates to progress made with respect to the submission and verification of claims and measures aimed at terminating the proceedings. Neither the Model Law nor the EC Regulation addresses the need for cooperation with respect to enterprise groups, where those obligations need to be more broadly applicable and the distinction between main and non-main or secondary proceedings is not relevant, except as it applies to multiple proceedings concerning an individual group member.

(a) Communication between courts

(i) General considerations

12. The Guide to Enactment of the Model Law[4] points to the desirability of enabling courts in cross-border insolvency proceedings to communicate directly

[4] Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, para. 179.

with foreign courts and insolvency representatives in order to avoid the use of the traditional, time-consuming procedures, such as letters rogatory or other diplomatic or consular channels and communications via higher courts. This ability is critical when the courts consider they should act with urgency to avoid potential conflicts or preserve value or the issues to be considered are time-sensitive. That ability to communicate should include the ability to initiate communication, by requesting information or assistance from foreign courts and insolvency representatives, as well as the ability to receive and process such requests from abroad.

13. The different approaches taken to communication between the courts and parties serve to illustrate some of the problems that might be encountered when seeking to promote cross-border cooperation. In addition to the question of whether there is specific authorization for communication between courts, there is very often hesitance or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitance or reluctance may be based upon ethical considerations; legal culture; language; or lack of familiarity with foreign laws and their implementation. They may also relate to concerns about the implications of communication for judicial independence and impartial decision-making. Some States have a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or indeed with other judges, as such communication may give rise to constitutional issues. In some States, ex parte communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable. Within States, judges and lawyers may have quite different views about the propriety of contacts between judges without the knowledge or participation of the attorneys for the parties. Some judges, for example, accept that there is no difficulty with private contact amongst themselves, while some lawyers would strongly disagree with that practice. Courts typically focus on the matters before them and, as noted above, may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or foreign operations.

14. A further issue of relevance to facilitating cooperation between insolvency proceedings affecting group members might be the ability or willingness of courts to take a global view of the business of the debtor and note what is occurring in insolvency proceedings in other jurisdictions concerning the same debtor or other members of the same group. This may be of particular importance where what occurs in other jurisdictions is likely to have a domestic impact (e.g. with respect to local employees and other social policy issues). Whilst it would not change the powers the courts would have under domestic law, knowledge of or about the foreign proceedings might nevertheless affect the court's approach to local proceedings and its willingness to coordinate them with the foreign proceedings. The challenge, however, is for the court to obtain the necessary information about a debtor's global operations and concurrent insolvency proceedings. One approach might be to permit appropriate documentary evidence to be provided or a foreign practitioner or insolvency representative of related group members to appear in the local court. Notwithstanding the practical difficulties, it is desirable that a court be able to take note of foreign proceedings that might affect local proceedings, particularly where a global solution for a multinational enterprise group is being sought.

15. Establishing communication in cross-border cases involving enterprise groups may facilitate cross-border proceedings in many ways. For instance, it may assist parties to better understand the implications or application of foreign law, particularly the differences or overlaps that may otherwise lead to litigation; advance resolution of issues through a negotiated result acceptable to all; and provoke more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions. It may also serve international interests by creating better understanding that will encourage international business and preserving value that would otherwise be lost through fragmented judicial action. Some of the potential benefits may be hard to identify at the outset, but may become apparent once the parties have communicated. Cross-border communication may reveal, for example, some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

16. Communication between judges or other interested parties should follow proper procedures in order to ensure the communication is transparent, effective and credible. At a general level, it might be appropriate to consider whether communication should be treated as a matter of course or as a last resort; whether a judge may advocate that a particular course of action be taken; and, with respect to the conditions that might apply to communication, such as those mentioned below, whether they should apply in all cases or whether there might be exceptions. While courts should be given broad discretion in carrying out their communications with foreign bodies, they should not be required to engage in communications they consider inappropriate in the circumstances of a particular case. A further issue relates to the subject matter of the communication, and in particular whether communication could address only matters of procedure or also matters of substance. Some judges take the view that they could discuss case management issues, issues of timing, use of cross-border agreements and which court might resolve which issue, but not substantive issues that touched upon the merits of the case.

(ii) Means of communication

17. Information may be communicated in several ways, such as by exchange of documents (e.g. copies of formal orders, judgements, opinions, reasons for decisions, transcripts of proceedings, affidavits and other evidence) or orally. The means of communication may be post, fax or e-mail or other electronic means, or telephone or videoconference, depending upon what is available and affordable in the States involved in the communication and what is appropriate or required in each case. Copies of written communications may also be provided to the parties in accordance with applicable notice provisions. Communication may be affected directly between judges or between or through court officials (or a court appointed intermediary) or insolvency representatives, subject to local rules. The development of new communication technologies supports various aspects of cooperation and coordination, with the potential to reduce delays and, as appropriate, facilitate face-to-face contact. As global litigation multiplies, these methods of direct communication are increasingly being used. Videoconferences, for example, have been used in preference to telephone conferences, as they provide reasonable control of the process and facilitate disciplined organization of the communication as the participants can hear and see each other, an aspect that is central to court proceedings generally. However, since these technologies are not available to all

courts, it is desirable that the focus be upon how the communication might be facilitated to suit the needs of the particular case, rather than upon the use of any particular technology.

(iii) Establishing rules or procedures for court-to-court communication

18. In any particular case it will be desirable to determine, as appropriate to the relevant jurisdictions and in accordance with applicable law, procedures to govern court-to-court communication to balance the interests of the different stakeholders and ensure that no one is prejudiced in any material way. The procedures might address: the parties to be notified of the proposed communication (e.g. all affected parties and their representatives or counsel); the persons permitted to participate in the communication and any limitations that will apply; the questions to be considered; whether the parties share the same intentions or understanding with respect to communication; organization and timing of the communication; recording of the communication; any safeguards that will apply to protect the substantive and procedural rights of the parties; the language of the communication and any consequent need for translation of written documents or interpretation of oral communications (and who should bear the administrative costs); acceptable methods of communication; handling of objections to the proposed communication; and questions of confidentiality.

19. Courts may adopt guidelines, such as the Court-to-Court Guidelines,[5] to address some of these issues. These guidelines typically are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate with one another, without changing the applicable domestic rules or procedures or to affecting or curtailing the substantive rights of any party in proceedings before the courts.

- Time, place and manner of communication

20. Generally, it is desirable that communications proceed at a time and place and in a manner mutually determined between the courts, the insolvency representatives and other stakeholders, as applicable. These arrangements need not necessarily involve the judges directly, but might be made through relevant court officials.

- Notice of proposed communication

21. In insolvency proceedings involving multinational enterprise groups, a balance needs to be struck between facilitating the communication in a practical and convenient manner and protecting the integrity of the communication by ensuring an open and transparent process. Various parties may be affected by communications between courts, and it may often be difficult, if not impractical, to ascertain the identity of all of those parties, including, for example, the creditors. Moreover, the jurisdictions involved may operate under different rules regarding the provision of notice, affecting issues of timing and the identity of recipients (i.e., not all stakeholders may be entitled to notice of certain issues). A key question will therefore concern the parties to be notified of any proposed communication. The

[5] Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001), available online at http://www.ali.org/doc/Guidelines.pdf.

absence of clear rules on how this issue should be approached has the potential to cause delay and erosion of value, especially where the communication is required to resolve or avoid conflicts or to address the coordination of particular issues, such as sale of assets or submission and verification of claims.

22. Provision of notice generally might be assisted by cooperation between the various courts to develop a list of parties required to be notified, which may include parties that are entitled to notice of any court business related to the insolvency proceedings, including communication.[6] Coordination of the provision of notice may be managed through an electronic system or a website, which could facilitate tracking of the changing identity of stakeholders entitled to notice in many insolvency proceedings, resulting from, for example, assignment or trading of claims; minimizing the costs associated with provision of notice; and the differences in the laws applicable to the provision of notice being taken into account. It would also, however, have to taken into consideration possible language, access, and confidentiality issues.

- Right to participate

23. To ensure the credibility of the communication and the parties directly involved in it, as well as fairness and transparency, it is desirable that communications proceed in a manner that is open to participation by relevant parties, rather than ex parte.

24. As noted above, however, there is a need to balance those requirements against the practicalities of organizing and conducting the communication. This may require participants to be limited to “affected parties”. Although different standards may govern the issue of who constitutes an “affected party” in the jurisdictions involved, it might generally be assumed that key stakeholders would include the debtor, the insolvency representative and relevant legal counsel. While the general principle should be that affected parties are entitled to participate, it may be desirable for the courts to have the right to agree, as required, to limit the number of participants in order to ensure the process is manageable.

- Recording of the communication as part of the record

25. To further ensure the transparency of court-to-court communication, the insolvency law may permit any communication to be recorded and a transcript prepared. The transcript may be made part of the record of the proceedings and, as such, be available at least to those participating in the communication or, more generally, in accordance with the rules applicable to the availability of such court records.

- Confidentiality

26. In general, communications between courts involved in parallel insolvency proceedings related to members of a multinational group should be as transparent as possible to ensure fairness to the parties involved and avoid creating incentives for the parties to hedge against the possibility of an adverse outcome. It is desirable that

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[6] See Court-to-Court Communication Guideline 12.

information not be treated as confidential simply because the communication occurs in a cross-border context.

27. However, much of the information relating to the debtors and their affairs that needs to be considered and shared in insolvency proceedings involving multinational enterprise groups may be commercially sensitive, confidential, or subject to obligations owed to third persons (such as trade secrets, research and development information, and customer information). Such information may be especially sensitive in the case of a debtor in reorganization proceedings where its continued ability to operate in the market and the protection of value may require confidentiality. Accordingly, the use of such information may need to be carefully considered and disclosure appropriately restricted to prevent third parties from taking unfair advantage of it.

28. The jurisdictions involved in insolvency proceedings relating to multinational enterprise group members may have different substantive rules regarding confidentiality and the release of information to parties. Those differences may need to be taken into account when considering cross-border communication and how they will be conducted and recorded, permitting the courts to reach agreement on the protections necessary to comply with applicable law.

29. Confidentiality of information may also be addressed in a cross-border insolvency agreement, [7] which can establish requirements for access to that information, including the use of confidentiality agreements.

- Costs of communication

30. The issue of costs of the communication may be a consideration, especially where many parties are affected and a means of communication is used that entails, in some States, relatively high costs, such as videoconferencing. Moreover, the use of multiple languages may complicate communication, with cost implications where translation of documents and interpretation of oral communication is required. It will be important to determine how the costs are to be borne by, or apportioned between, the relevant insolvency proceedings. If reimbursement of the costs of certain parties is involved, it should be clear how, and the currency in which, that will occur.

- Effect of communication

31. Where a court communicates with a foreign court in the context of cross-border insolvency proceedings, the insolvency law should make it clear that the communication would not have a substantive effect on the authority or powers of the court, the matters before it, its orders, or the rights and claims of parties participating in the communication. Such a proviso reassures the parties that the communication between the authorities involved in the insolvency proceedings will not jeopardize their rights nor affect the authority and independence of the court before which they are appearing. It is likely to reduce the likelihood of objections to planned communication and furnish the courts and their representatives with greater flexibility in their cooperation with each other. Such a proviso may also ensure that

[7] See UNCITRAL Practice Guide, III.B, paras. 168-171; Legislative Guide, part two, chap. III, paras. 28, 52, 115 and recommendation 111.

courts and their representatives do not operate beyond the limits of their authority in engaging in communication with their counterparties in different jurisdictions.

(b) Coordination of the debtor's assets and affairs

32. The conduct of cross-border insolvency proceedings concerning enterprise groups will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings. Coordination of such use, realization and disposal will help to avoid disputes and ensure that the benefit of all parties in interest is the key focus, particularly in reorganization. For example, one member of an enterprise group may serve as the exclusive supplier of another group member or have exclusive control over a key resource used by another member, so that insolvency proceedings with respect to one of those members might have profound consequences on the continuing operation of the entire group. Coordinating the debtor's assets and affairs may involve both the courts and the insolvency representatives. Some matters may require specific approval by the courts, while others may be addressed by agreement between the insolvency representatives.

33. Some of the issues to be considered in facilitating this coordination may include: the location of the various assets and the identification of the jurisdiction to which they are subject; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of (e.g., the insolvency representative, the courts or in some cases the debtor), including the approvals required; the extent to which responsibility for those assets can be shared among or allocated to those different parties in different States; how information can be shared to ensure coordination and cooperation; and the sequence in which proceedings should evolve. Coordination may be relevant to investigating the debtor's assets, considering possible avoidance proceedings, and restricting the debtor's ability to move assets to locations beyond the reach of the court or insolvency representative. It may also require the courts to identify the optimal forum for a addressing a particular issue, such as sale or disposal of a certain asset, and defer to that forum to the extent permitted by law.[8]

(c) Appointment of a court representative

34. Such a person may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions. The person may have a variety of possible functions including: acting as a go-between for the courts involved, especially where issues of language are raised; developing an agreement in consultation with the relevant parties; promoting consensual resolution of issues between the parties; and ensuring that notice with respect to certain business before the courts is given to all parties in interest (other members of the enterprise group, creditors, and foreign courts or insolvency representatives). The appointing court will typically outline the terms under which the appointee is authorized to act and the extent of its powers. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

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[8] Allocation of responsibility for certain actions between the different courts is discussed in the UNCITRAL Practice Guide, Section II.B, paras. 18-20; section III.B, paras. 55-60, 71-74.

(d) Use of cross-border agreements (see 4. below)

(e) Coordination of hearings

35. Hearings that might variously be described as joint, simultaneous or coordinated[9] ("coordinated hearings") can significantly promote the efficiency of parallel insolvency proceedings involving members of a multinational enterprise group by bringing relevant stakeholders together at the same time to discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays. What needs to be emphasized with respect to such hearings, however, is that each court should reach its own decision independently and without influence from the other courts. While such hearings may be relatively convenient to organize in a domestic setting to ensure coordination of proceedings with respect to different group members, they can be logistically very complicated to organize in an international setting, involving as they may different languages, time zones, laws, procedures and judicial traditions. They may result in a deadlock if, for example, the competencies of the authorities engaged in the hearing are not precisely agreed or established.

36. Although they are potentially difficult to organize, such hearings have been used between some States that share a common language, legal tradition and similar time zones and have led to the successful resolution of difficult issues to the benefit of all parties concerned.[10] Such hearings might, however, be more widely used in the future, with the assistance of appropriate procedures and safeguards to assist careful planning and avoid complications. Those rules of procedure might address, for example, use of pre-hearing conferences; conduct of the hearings, including the language to be used and need for interpretation; requirements for the provision of notice; methods of communication to be used so that the courts can simultaneously hear each other; conditions applicable to the right to appear and be heard; documents that may be submitted; the courts to which participants may make submissions; the manner of submission of documents to the court and their availability to other courts; question of confidentiality; limitations on the jurisdiction of each court to the parties appearing before it; and rendering of decisions.[11]

37. Some guidelines and agreements dealing with these types of hearings provide that in order to best plan for orderly administration, the courts, their appointees, or the insolvency representatives should communicate with their foreign counterparties in advance of the hearing to establish guidelines related to all procedural, administrative, and preliminary matters. Once a hearing has been concluded, the relevant authorities may further communicate to assess the contents of the hearing, discuss next steps (including additional hearings), develop or modify guidelines for future hearings, consider whether issuing joint orders would be feasible or

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[9] These types of hearings are discussed in the UNCITRAL Practice Guide, III.B, paras. 145-150.

[10] See for example, the cases of Quebecor World Inc., Montreal Superior Court, Commercial Division, (Canada) No. 500-11-032338-085 and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (JMP) (2008) and Solv-Ex Canada Limited and Solv-Ex Corporation, Alberta Court of Queen's Bench, Case No. 9701-10022 (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA (28 January 1998).

[11] Cf. UNCITRAL Model Law, article 10.

warranted and how certain procedural issues that were raised in the hearing should be resolved.[12]

[Recommendations from A/CN.9/WG.V/WP. 85/Add.1]

Recommendations 240-247

Purpose of legislative provisions

The purpose of legislative provisions on cooperation in the context of multinational enterprise groups is:

(a) To authorize cooperation between the courts seized of insolvency proceedings relating to different members of an enterprise group in different States;

(b) To authorize cooperation between those courts and insolvency representatives appointed to those different proceedings; and

(c) To facilitate and promote the use of various forms of cooperation to coordinate insolvency proceedings with respect to different enterprise groups members in different States and establish the conditions and protections that should apply to those forms of cooperation to protect the substantive and procedural rights of parties and the authority and independence of the courts.

Contents of legislative provisions

Cooperation between the court and foreign courts or foreign representatives

240. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the insolvency representative or other person appointed [for that purpose by the court], to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

Cooperation between the insolvency representative and foreign courts

241. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

Cooperation to the maximum extent possible involving courts

242. The insolvency law should specify that the cooperation to the maximum extent possible between the courts and between the courts and foreign representatives, [referred to in recommendations 240 and 241], may be implemented by any appropriate means, including:

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[12] See also UNCITRAL Practice Guide, III.B, paras. 145-150; Court-to-Court Communication Guideline 9 (e).

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

(b) Participation in communications with the foreign court or foreign representative by telephone, videoconference or other electronic means;

(c) Provision to the foreign court or the foreign representative of copies of documents issued by the court concerning the enterprise group members subject to insolvency proceedings, including formal orders, judgements, and transcripts of proceedings;

(d) Provision of copies of documents that have been or are to be filed with the court concerning the enterprise group members subject to insolvency proceedings to the foreign court or foreign representative;

[(e) Coordination of the administration and supervision of the assets and affairs of the enterprise group members subject to insolvency proceedings];

[(f) Appointment of a person or body to act at the direction of the court]; and

[(g) Approval or implementation of agreements concerning coordination of insolvency proceedings in accordance with recommendation 254.]

Direct communication between the court and foreign courts or foreign representatives

243. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

244. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

Conditions applicable to cross-border communication involving courts

245. The insolvency law should specify that communication between the courts and between courts and foreign representatives should be subject to the following conditions:

(a) The time, place and manner of communication should be determined [by] between the courts or [by] between the courts and foreign representatives;

(b) Notice of any proposed communication should be provided to affected parties [or their representatives] in all relevant States in accordance with applicable law and in the manner considered appropriate by the courts, unless otherwise agreed by the courts;

(c) Affected parties or their representatives, as appropriate, should be entitled to participate in person during the communication, unless otherwise agreed by the courts;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication, filed as part of the record of the proceedings and made available to the courts and to [affected parties or their] representatives involved in the communication;

(e) Communications should only be treated as confidential in exceptional cases to the extent considered appropriate by the courts and in accordance with applicable law; and

(f) Communication should respect the mandatory rules of the jurisdictions involved in the communication as well as the substantive and procedural rights of affected parties, in particular the confidentiality of information.

246. The insolvency law should specify that:

(a) No compromise or waiver by the court of any powers, responsibilities or authority;

(b) No substantive determination of any matter in controversy before the court [or the foreign court];

(c) No waiver by any of the parties of any of their substantive rights and claims; and

(d) No diminution of the effect of any of the orders made by the court [or the foreign court], shall be implied as the result of [any] communication made in accordance with these recommendations.

Coordination of hearings

247. The insolvency law may permit the court to conduct a [joint] hearing in coordination with a foreign court. Where hearings are coordinated, they may be subject to certain conditions to safeguard the substantive and procedural rights of parties and the jurisdiction [and independence] of each court. Those conditions might address the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to other courts; and limitations of the jurisdiction of each court to the parties appearing before it.[13] [Notwithstanding the conduct of a joint or coordinated hearing, each court remains responsible for reaching its own decision on the matters before it.]

3. The insolvency representative

(a) Cooperation between insolvency representatives

38. As noted in the Legislative Guide, the insolvency representative plays a central role in the effective and efficient implementation of the insolvency law, with day-to-day responsibility for administration of the insolvency estate of the debtor. As such, the insolvency representatives will play a key role in ensuring the successful coordination of multiple proceedings concerning enterprise group members through working with other insolvency representatives and the courts

[13] See also UNCITRAL Model Law, article 10.

concerned. In order to fulfil that role, the insolvency representative, like the court, will need to have appropriate authorization to undertake the necessary tasks of, for example, sharing information, coordinating day to day administration and supervision of the debtors' affairs, negotiating cross-border insolvency agreements and so forth.

Recommendations 248-250

Purpose of legislative provisions

The purpose of legislative provisions on cooperation between insolvency representatives in the context of multinational enterprise groups is:

(a) To authorize cooperation between insolvency representatives appointed to administer insolvency proceedings relating to different members of an enterprise group in different States; and

(b) To facilitate and promote the use of various forms of cooperation between those insolvency representatives and establish the conditions and protections that should apply to those forms of cooperation to protect the substantive and procedural rights of parties.

Contents of legislative provisions

Cooperation between insolvency representatives

248. [The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign representatives to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.]

Communication between insolvency representatives

249. [The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign representatives concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.] The insolvency law should permit insolvency representatives to communicate with each other as soon as they are appointed.

Cooperation to the maximum extent possible between insolvency representatives

250. The insolvency law should specify that the cooperation to the maximum extent possible between insolvency representatives, referred to in recommendation 248, should be implemented by any appropriate means, including:

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

(b) Use of cross-border insolvency agreements in accordance with recommendation 253;[14]

(c) Division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or leading role;

(d) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings; and

(e) Coordination with respect to proposal and negotiation of coordinated reorganization plans, communication with creditors and meetings of creditors.

(b) Appointment of a single or the same insolvency representative

39. The issue of promoting coordination may also be approached via the appointment of the insolvency representative, by considering, for example, the appointment of the same insolvency representative in multiple proceedings affecting members of the same group in different States, where that person (whether natural or legal) met applicable local requirements (see above, paras. 173-178 with respect to domestic proceedings). Where such a person could be appointed, they would be subject to the local law of the States in which they were appointed, in particular as regards qualification, licensing (where applicable), powers and duties and supervision by the court. Accordingly, the insolvency representative would be subject to the same local requirements as any insolvency representative appointed in one of those States would be.

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

41. Where such an approach is adopted, provisions to avoid potential conflicts of interest along the lines of draft recommendation 231 may need to be considered. Such a conflict of interest might arise when the group members represented by a single insolvency representative had different interests in a particular issue, for example, post-commencement finance or verification and admission of claims or when the obligations of the insolvency representative under different insolvency laws were directly in conflict. Those cases might be addressed in the same manner as indicated above with respect to appointment of a single or the same insolvency representative in the domestic context (see recommendation 234).

Recommendations 251-252

Purpose of legislative provisions

[The purpose of legislative provisions on appointment of the insolvency representative is, in the interests of promoting efficient and effective administration of insolvency proceedings members of the same enterprise group in different States,

[14] See the UNCITRAL Practice Guide, which compiles practice with respect to the use and negotiation of these agreements, including a discussion of the issues typically addressed.

to authorize the appointment of a single or the same insolvency representative to those multiple proceedings.]

Contents of legislative provisions

Appointment of the same insolvency representative

251. The insolvency law should permit the court, [in appropriate cases,][where the court determines it to be in the best interests of the relevant insolvency proceedings] to coordinate with foreign courts with respect to the appointment of the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States. To the extent required by the [insolvency] law, the insolvency representative would be subject to the supervision of each of the appointing courts.

Conflict of interest

[252. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members in different States. Such measures may include the appointment of one or more additional insolvency representatives.]

4. Use of cross-border insolvency agreements[15]

42. The insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border insolvency agreements. These agreements are discussed in detail in the UNCITRAL Practice Guide. They are designed to address issues arising in cross-border cases, facilitating their resolution through cooperation between the courts, the debtor, and other stakeholders across jurisdictional lines to work efficiently, and increase realizations for stakeholders in potentially competing jurisdictions. Their use can effectively reduce the cost of litigation and enable parties to focus on the conduct of the insolvency proceedings, rather than upon resolving conflict of laws and other such disputes. Moreover, in addition to clarifying parties' expectations, these agreements can assist with preservation of the debtor's assets and maximization of value.

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

[15] For a detailed discussion of cross-border insolvency agreements, see the UNCITRAL Practice Guide.

while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved.

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

45. As noted above, cross-border insolvency agreements may include only general principles on how cooperation and coordination should be handled, or also address specific issues depending upon the needs of the particular case and the issues to be resolved. Issues typically addressed include some of all of the following: (a) allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives; (b) availability and coordination of relief; (c) coordination of recovery of assets for the benefit of creditors generally, in case claims for assets of a group member subject to bankruptcy proceedings in a different state are raised; (d) submission and treatment of claims; (e) use and disposal of assets; (f) methods of communication, including language, frequency, and means; (g) provision of notice; (h) coordination and harmonization of reorganization plans; (i) issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution; (j) administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions; (k) choice of applicable law with respect to overlapping issues; (l) the allocation of responsibilities between the parties to the agreement; (m) costs and fees; and (n) safeguards. The latter typically relate to ensuring that there are no derogations from court independence and authority, public policy and applicable law, particularly with respect to any obligations undertaken by the insolvency representative or parties, including the debtor, in the agreement.

46. These agreements are increasingly common, especially in certain States, and have been successfully employed in different situations, such as concurrent reorganization and liquidation proceedings in different states; main and non-main proceedings as defined by the Model Law; and concurrent insolvency and non-insolvency proceedings in different States. It should be noted, however, that while the insolvency law of certain States may permit courts to approve cross-border agreements regarding the same debtor (for example, through provisions analogous to article 27 of the Model Law), that authorisation may not necessarily extend to the use of such agreements in the group context. What might be required to facilitate

global resolution of a group's financial difficulties (be it global reorganization or a combination of different procedures) is an agreement to coordinate multiple proceedings with respect to different debtors in different States, albeit members of the same group. Many laws may lack the provisions necessary to enable a court to approve or recognize an agreement relating not only debtors subject to its jurisdiction, but also to debtors that are not, albeit that they are members of the same enterprise group.

47. It is desirable, therefore, that in order to enhance cross-border cooperation an insolvency law should authorize the relevant parties – insolvency representatives and other parties in interest – to conclude cross-border insolvency agreements concerning different group members in different States and permit the courts to approve or implement them, taking into consideration the group context. It should be noted that different States may have different form requirements that will have to be observed in order for these agreement to be effective in the relevant jurisdictions.

Recommendations 253-254

Purpose of legislative provisions

[The purpose of legislative provisions with respect to cross-border insolvency agreements is to ensure that the insolvency law permits the use of such agreements to facilitate cooperation with respect to insolvency proceedings concerning enterprise group members in different States and authorizes their approval by the court, as appropriate.]

Contents of legislative provisions

Authority to enter into cross-border insolvency agreements

253. The insolvency law should permit the insolvency representative and other parties in interest to enter into, [to the extent permitted or in the manner required by applicable law,] a cross-border insolvency agreement [involving two or more members of an enterprise group in different States] to facilitate coordination of insolvency proceedings with respect to those group members.

Approval or implementation of cross-border insolvency agreements

254. The insolvency law should permit the court to approve or implement a cross-border insolvency agreement [involving two or more members of an enterprise group in different States] to facilitate coordination of the insolvency proceedings with respect to those enterprise group members.